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## The Efficiency Norm

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# THE EFFICIENCY NORM

BROOKE D. COLEMAN\*

**Abstract:** Efficient is not synonymous with inexpensive. Rather, it refers to an optimal tradeoff between cost and function; a system may simultaneously become less expensive and less efficient, if cost savings are offset by loss of productivity. Yet, this Article argues that if we conceive of the rules and doctrines governing civil procedure as a product, the Judiciary, Congress, and federal civil rulemakers have confused cheap with efficient. They have made this version of “efficiency”—what this Article calls the efficiency norm—the dominant norm of the civil litigation system. This efficiency norm is problematic because institutional actors falsely equate efficiency with the idea that litigation must simply become cheaper. This has led to two profound shifts in key presumptions underlying civil litigation: the shift from a merits-based trial to non-trial adjudication and the shift from plaintiff receptivity to plaintiff skepticism. The Article argues that under a real efficiency analysis—one that weighs both the benefits and costs of making litigation cheaper—these now-dominant civil litigation presumptions are dangerous and unwarranted because they further de-democratize civil litigation. Finally, this Article argues that the efficiency norm must be reclaimed. It proposes a reframed definition of efficiency and argues that such a definition will enable a better assessment and recalibration of the civil litigation system.

## INTRODUCTION

As even the most novice student of economics knows, the term efficient is not synonymous with inexpensive. Yet, if we conceive of the rules and doctrines governing procedure as a product, the Judiciary, Congress, and federal civil rulemakers are giving us a product that is cheap and calling it efficient. Efficiency—in and of itself—is not an odious normative value. Defined accurately, efficient changes to the rules and doctrines governing the civil litigation system would balance all costs and benefits, both pecuniary and nonpecuniary.<sup>1</sup> Efficiency would indeed be a worthy goal because it

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<sup>1</sup> See *infra* notes 259–270 and accompanying text.

would make the whole system work better. Stated differently, true efficiency would produce high-value civil procedure. The key, and this Article's critique, is that institutional actors are using a flawed definition of efficiency—what this Article calls the efficiency norm.<sup>2</sup> This faulty conception of efficiency is not producing high-value procedure, but is instead resulting in cut-rate procedural rules and doctrines.

The misapprehension of what efficiency really means is highly problematic. First, the focus on simple costs too narrowly defines efficiency and incorrectly excludes a comprehensive set of costs that, although more difficult to quantify, are critical to an accurate measure of efficiency. From proposed changes to the discovery rules, to U.S. Supreme Court decisions about pleading and arbitration, changes are justified by reasoning that they will lower the cost of litigation.<sup>3</sup> Yet, institutional actors tend to rely on a narrow category of costs that measure how much a defendant or plaintiff will have to pay at each litigation moment. Costs that are more difficult to quantify, such as the cost of mistakenly filtering out meritorious claims, are left out of the analysis. Relatedly, measurable benefits are not given adequate weight; mere financial costs are privileged above all other interests.

Second, institutional actors' commitment to the efficiency norm has contributed to a shift in key presumptions underlying civil litigation in two critical ways: the shift from a merits-based trial to non-trial adjudication and the shift from plaintiff receptivity to plaintiff skepticism.<sup>4</sup> For example, when the Federal Rules of Civil Procedure ("Civil Rules") were adopted in 1938, the rule drafters assumed that the ultimate goal of the system was to prepare each case for a trial on the merits.<sup>5</sup> Modern rulemaking bears little

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<sup>2</sup> See *infra* notes 60–162 and accompanying text. This efficiency norm differs from the efficiency norm discussed in Richard Posner's article observing how what he called an "efficiency norm" would benefit common law adjudication. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487 (1980). The "efficiency norm" as used in Judge Posner's article argues that a common law system that maximizes wealth for all of society does not do so in an unfair redistributive way because the parties and the judges are guided by an efficiency norm. *Id.* at 505. A detailed discussion of law and economic literature's definition of efficiency is in Part III of this Article. See *infra* notes 112–162 and accompanying text.

<sup>3</sup> See *infra* notes 60–162 and accompanying text.

<sup>4</sup> See *infra* notes 164–249 and accompanying text.

<sup>5</sup> See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440 (1986) [hereinafter Marcus, *Fact Pleading*]. As described by one scholar,

Rather than dwell on pleading niceties, under the new system litigants were to use the expanded discovery mechanisms provided by the Federal Rules to get to the merits of the case. Armed with that information, they could in appropriate cases move for summary judgment, allowing the court to decide the merits. Normally, however, the proper method for resolving them was trial by jury.

resemblance to this past. The presumption is not one of trial on the merits, but is instead one of non-trial adjudication, whether that be by pre-trial disposition, settlement, or alternative dispute resolution.<sup>6</sup> The second shift—from plaintiff receptivity to plaintiff skepticism—concerns how the system views plaintiff requests, not just for relief but also for progressive steps within the system. For instance, the initial presumption under the Federal Rules of Civil Procedure was to provide plaintiffs with access to discovery. The rules were fashioned with broad definitions of relevance and a system by which the producing party would have to demonstrate excessive cost or burden in order to resist production. The currently proposed amendments to the discovery rules—requiring a demonstration of proportionality in order to gain access to information—are but one example of how the discovery system has shifted from a presumption of plaintiff receptivity to a presumption of plaintiff skepticism.<sup>7</sup> Like the attitudes toward trial, this plaintiff receptivity-to-skepticism presumption has shifted at all levels of the civil litigation system.<sup>8</sup> These shifts, the Article argues, are unwarranted both because they rely on a false conception of efficiency and because they further de-democratize the civil litigation system.

Although scholars have examined the time-worn tension between efficiency and justice, little work has been done to unpack and critique the efficiency norm itself. Scholars have adeptly critiqued the resulting civil litigation system for losing the civil trial,<sup>9</sup> for being hostile to particular kinds of plaintiffs,<sup>10</sup> and for becoming too cost-conscious.<sup>11</sup> But, scholars have large-

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*Id.*

<sup>6</sup> See *infra* notes 164–249 and accompanying text (discussing the increased role of the Judiciary in managing and settling cases). The same can be seen in how the Judiciary and Congress approach procedural doctrine. See *infra* notes 233–249 and accompanying text.

<sup>7</sup> See *infra* notes 164–249 and accompanying text.

<sup>8</sup> For instance, Congress has adopted laws like the Private Securities Litigation Reform Act, which, in limiting a plaintiff's access to discovery until after surviving a defendant's motion to dismiss, expressly reflects this same shift. See *infra* notes 225–249 and accompanying text.

<sup>9</sup> See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 577–78 (2004) (discussing the risks in drawing too many conclusions from one empirical data point, but discussing the vanishing trial nonetheless); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 591 (2004) (arguing that “there is sufficiently reliable evidence to believe that the rate of case termination as a result of summary judgment rose substantially from 1960 to 2000”); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 408–14 (2011) (arguing that the benefits of trial require thinking about how to bring some trial adjudication back into the system); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 500–01 (2004) (documenting the precipitous decrease in trial rates).

<sup>10</sup> See Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 503–04 (2012) (arguing that changes in procedural doctrine have disproportionately and negatively im-

ly accepted these changes as de facto;<sup>12</sup> they critique the result and argue for ways to better function within the existing procedural paradigm.<sup>13</sup> In other words, they argue that the delicate balance between efficiency and justice—as outlined in Federal Rule of Civil Procedure 1—is uneven within the system as it presently exists.

This Article argues that we should not be so quick to accept these shifts in the first place and that we should carefully reconsider what efficiency means. It may be that settlement makes more sense now than when the Civil Rules were adopted in 1938.<sup>14</sup> Moreover, the complexity of cases may require additional rules and thought, creating a litigation world that the 1938 rulemakers might not have envisioned.<sup>15</sup> Finally, the civil jury trial

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pacted less-resourced plaintiffs); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (“This Article finds that setting significantly higher and more resource-consumptive procedural barriers for plaintiffs and moving to the ever-earlier disposition of civil suits . . . runs contrary to many of the values underlying the Federal Rules.”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013) (“All of these manifestations of the backlash have been given traction by the Supreme Court, which seems to have placed a thumb on the justice scale favoring corporate and government defendants. These manifestations have impaired both access to the federal courts for many citizens and the enforcement of various national policies.”).

<sup>11</sup> See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1133 (2003) (arguing that “an unfettered commitment to ‘efficiency’ in the pretrial disposition context . . . will erode other systemic values”); see also *infra* notes 112–162 and accompanying text (arguing that overemphasis on simple costs has contributed to a problematic definition of efficiency).

<sup>12</sup> This discussion has been focused on the idea that the “liberal ethos” that informed the original federal rulemaking endeavor has transformed into a “restrictive” one. This discussion, covered in greater detail in Part III section B, addresses the ethos transformation, but does not diagnose its origin. See, e.g., Richard Marcus, *Confessions of a Federal “Bureaucrat”: The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 109 (2007) [hereinafter Marcus, *Confessions*] (noting that recent Supreme Court decisions “underscore the extent to which the Liberal Ethos is in eclipse”); Marcus, *Fact Pleading*, *supra* note 5, at 439 (coining the term “liberal ethos” and observing that “Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the ‘liberal ethos,’ in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery”); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010) (“Indeed, I would say that a ‘restrictive ethos’ prevails in procedure today . . .”).

<sup>13</sup> See, e.g., J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1713–14 (2012) (arguing that settlement is the norm in civil litigation, so procedural rules and doctrine should be devised to better facilitate that norm).

<sup>14</sup> See *infra* notes 22–59 and accompanying text (discussing historical changes in modern litigation).

<sup>15</sup> See Marcus, *Confessions*, *supra* note 12, at 106–07 (“And those academics who shed their ideological views probably must agree that the most vigorous embrace of the liberal ethos could result in dubious outcomes (particularly in an era of billion-dollar verdicts and bet-your-industry decisions by a single jury).”).

may have “vanished,” and in some cases, that might be a good result.<sup>16</sup> To be sure, multiple factors have moved the civil litigation system in this direction, but this Article argues we should be skeptical of the role the efficiency norm has played in these presumptive shifts.<sup>17</sup>

Accordingly, Part I of the Article provides a brief history of civil litigation in the United States in order to contextualize the discussion of the efficiency norm.<sup>18</sup> Part II then examines how the current efficiency norm—a focus on a narrow set of litigation costs—has become the dominant norm in how institutional actors design procedural doctrine.<sup>19</sup> Actions taken by the Supreme Court, Congress, and federal civil rulemakers, as well as the rhetoric utilized by the public at large, demonstrate that these costs are often the sole concern. Part III argues against this conception of the efficiency norm and the way it has affected civil litigation.<sup>20</sup> First, it challenges how efficiency has been defined, explaining that the definition is often incomplete and inaccurate. Further, it argues that even under the efficiency norm, efficient results have not necessarily been obtained. Second, Part III asserts that the efficiency norm has contributed to shifts in critical presumptions underlying civil litigation. These presumptions—the shift from merits-based trial to non-trial adjudication and the shift from plaintiff receptivity to plaintiff skepticism—have occurred over time and have been made at all institutional levels, including Congress and the Judiciary. In Part IV, this Article offers a path toward righting the efficiency norm.<sup>21</sup> First, it critiques the now-dominant civil litigation presumptions, arguing that they encourage the further privatization of litigation, stifle public debate about legal developments, and de-democratize the court system. Part IV then concludes with an argument for a reclaimed efficiency definition—one that attempts to more accurately quantify less measurable costs, including, for example, the systemic cost of inaccurately eliminating meritorious claims.

## I. MODERN LITIGATION IN AMERICA—AN OVERVIEW

This Part is intended to contextualize the discussion of the efficiency norm and its attendant shifting procedural presumptions. Efficiency does not define itself, and these shifts do not take place on the basis of the efficiency norm itself. They were formed and informed by what has occurred in civil litigation more generally. Thus, it is critical to understand the setting in which this phenomenon has developed. Yet, an exhaustive overview is be-

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<sup>16</sup> See *infra* notes 22–59 and accompanying text.

<sup>17</sup> See *infra* notes 164–249 and accompanying text.

<sup>18</sup> See *infra* notes 22–59 and accompanying text.

<sup>19</sup> See *infra* notes 60–109 and accompanying text.

<sup>20</sup> See *infra* notes 112–249 and accompanying text.

<sup>21</sup> See *infra* notes 250–272 and accompanying text.

yond the scope of this Article. Instead, this Part will look at four key features of American civil litigation from the late 1930s to the present: (i) civil case filing rates; (ii) civil trial rates; (iii) changes in substantive law; and (iv) the cultural dialogue about civil litigation.

First, as the American population has grown, so have the absolute number of civil cases filed. In 1938, the year the Federal Rules of Civil Procedure were adopted, 33,409 civil cases were filed in federal court.<sup>22</sup> From 1945 through 1969, the number of federal civil cases filed annually ranged from 51,600 to 77,193.<sup>23</sup> During the 1970s, the amount of civil cases filed per year nearly doubled from 87,321 in 1970 to 154,666 in 1979.<sup>24</sup> By 1982, the number of cases filed annually had surpassed the 200,000 mark.<sup>25</sup> The filing rate has remained above 200,000 ever since.<sup>26</sup> Most recently in 2014, 260,455 federal civil cases were filed.<sup>27</sup>

Even though filing rates have increased, trial rates have done the inverse. In 1938, approximately 18% of civil cases that were terminated went to trial.<sup>28</sup> By 1945, the percentage of civil cases that went to trial and reached a verdict decreased to 5.4%.<sup>29</sup> That percentage steadily increased though, reaching an all-time high of 12.6% in 1968.<sup>30</sup> The percentage held steady at around 11% until 1977 when it started to decline.<sup>31</sup> Between 1977 and 1984,

<sup>22</sup> David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 120 (1981).

<sup>23</sup> *Id.* at 120, 126, 131, 138.

<sup>24</sup> See DANIEL MCGILLIS, BUREAU OF JUSTICE STATISTICS, THE FEDERAL CIVIL JUSTICE SYSTEM 4 (Frank D. Balog ed., 1987), <http://www.bjs.gov/content/pub/pdf/fcjs.pdf> [<http://perma.cc/AM2C-MJ5W>].

<sup>25</sup> *Id.* Specifically, 206,193 cases were filed. *Id.*

<sup>26</sup> See ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-4: U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2014, at 1 (2014), <http://www.uscourts.gov/file/18268/download> [<http://perma.cc/SA6Z-RC4S>] [hereinafter TABLE C-4].

<sup>27</sup> *Id.* Population statistics explain this growth to a degree. In 1938, there were approximately 130 million people residing in the United States, according to census data. *Historical National Population Estimates*, U.S. CENSUS BUREAU (last updated June 28, 2000), <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> [<http://perma.cc/T6NZ-PEPB>]. That number had nearly doubled by the mid-1990s. See *id.* As of July 1, 1994, there were 260,327,021 people. *Id.*

<sup>28</sup> Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3. Today's population estimate is over 300 million. *Annual Estimates of the Resident Populations: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU (Dec. 2014), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2014\\_PEPANNRES&src=pt](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPANNRES&src=pt) [<http://perma.cc/F97E-4NT4>].

<sup>29</sup> Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 558 tbl.1 (1986).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

the percentage of trials decreased from 9.9% to 5.9%.<sup>32</sup> It has been steadily decreasing ever since. Today, the trial rate hovers around 1.1%.<sup>33</sup>

What this means in terms of the absolute number of trials is of interest. In 1945, 2835 cases went to trial.<sup>34</sup> In 1968, when the trial rate was 12.6%, the number of trials was 8688.<sup>35</sup> From 1977 to 1984, this metric ranged from 11,604 to 14,374.<sup>36</sup> Yet, the number of trials in 2014 was 2920.<sup>37</sup> In other words, even though the number of civil cases filed has increased drastically since 1945, the absolute number of trials currently is almost equal to that of 1945—approximately 3000 trials per year.

What has created the increased civil filing rates but decreased trial rates is a complicated question to which there is no straightforward answer. Part of that story, however, is that changes in the substantive law have affected civil litigation. More specifically, the creation of additional substantive rights has impacted civil filing rates. Starting in the 1950s, but really taking off in the 1970s, Congress began creating myriad federal legal rights and remedies. These changes were, for the most part, controversial, and they necessarily increased the kinds of claims that could be brought. This led to higher civil filing rates.<sup>38</sup> Federal laws like Title VII of the Civil Rights Act of 1964<sup>39</sup> and Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>40</sup> created federal substantive rights and private modes of enforcement that had never before existed.<sup>41</sup> Many of these new laws also provided for attorney’s fees, creating greater incentives for lawyers to take on more cases.<sup>42</sup> Moreover, the criminal caseload for federal judges in-

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<sup>32</sup> *Id.*

<sup>33</sup> TABLE C-4, *supra* note 26, at 1; *see also* Galanter, *supra* note 9, at 460–61 (examining the decrease in trial rates and absolute number of trials in American courts).

<sup>34</sup> Resnik, *supra* note 29, at 558 (outlining the number of completed civil trials from 1945 through 1984).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> TABLE C-4, *supra* note 26, at 1 (identifying the number of federal civil cases terminated in 2014 by nature of lawsuit and method of termination).

<sup>38</sup> *See id.*; Miller, *supra* note 11, at 992 (discussing how the increase in number of legal remedies available led to increased litigation).

<sup>39</sup> 42 U.S.C. §§ 2000e to e-17 (2012).

<sup>40</sup> 18 U.S.C. §§ 1961–1968 (2012).

<sup>41</sup> *See* Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 499 (1980) (“In the 1960s vindication of individual rights through expansions in constitutional doctrine became commonplace. Although the Burger Court slowed that trend, it has continued and in some respects expanded another trend in federal law—the protection of individual rights by means of federal civil rights statutes.”); Richard B. Stewart & Cass R. Sunstein, *Public Program and Private Rights*, 95 HARV. L. REV. 1193, 1195–96 (1982) (discussing the range of cases federal courts recognize that pit individuals against government agencies).

<sup>42</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396–97 (1982).



creased due to the federalization of crimes.<sup>43</sup> The combination of additional substantive rights and this increase in judges' criminal docket was a large part of the increase in the overall federal judicial caseload.

Finally, in the ether of all of these statistics and the creation of substantive rights lies the cultural and political debate about civil litigation. From the 1930s until the late 1960s and early 1970s, cultural attitudes about litigation were generally positive.<sup>44</sup> That attitude has perceptibly moved. By the mid-to-late 1970s, popular culture's view of litigation was generally negative.<sup>45</sup> In 1978, a *U.S. News & World Report* article pondered *Why Everybody is Suing Everybody*.<sup>46</sup> The perception was that our society had become more litigious.<sup>47</sup> Individuals appeared no longer able to resolve their disputes—whatever their merit—without going to court. Moreover, these disputes were viewed and portrayed as petty. The McDonald's coffee spill case is the paradigmatic example—a case where the media and the public agreed that suing McDonald's for the temperature of its coffee was frivolous.<sup>48</sup>

The media and the public were not alone in their assessment of the civil litigation system. Judges and lawmakers joined in this debate. Judges complained of a litigation system gone astray. Legislators began attempting to rein in the perceived litigation explosion through "tort reform" and other limitations on bringing disputes.<sup>49</sup> Finally, corporations became major play-

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<sup>43</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 59–95 (2d ed., 1996).

<sup>44</sup> See Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 9–10 (1983) (stating "[w]e should remind ourselves just how recent this [negative] perception of [litigation] is," and noting that it was not until the mid to late 1970s that the "spectre of litigiousness was fully visible").

<sup>45</sup> *Id.* at 7–11.

<sup>46</sup> David F. Pike, *Why Everybody Is Suing Everybody*, *U.S. NEWS & WORLD REP.*, Dec. 4, 1978, at 50, 50.

<sup>47</sup> Galanter, *supra* note 44, at 6–11 (discussing negative public sentiment regarding supposed litigation explosion).

<sup>48</sup> See *Liebeck v. McDonald's Rests.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994), *vacated*, No. CV-93-02419, 1994 WL 16777704 (N.M. Dist. Nov. 28, 1994); Kevin G. Cain, *And Now, the Rest of the Story . . . About the McDonald's Coffee Lawsuit*, *HOUS. LAW*, July/Aug. 2007, at 25 (noting derisive reaction by the public and media to the McDonald's coffee lawsuit). *But see* *HOT COFFEE* (HBO documentary broadcast June 27, 2011) (showing that the victim's injuries were severe and that McDonald's arguably knew that its product was dangerous).

<sup>49</sup> Many of these reforms took place at the state level and included caps on damage awards. See, e.g., Jane C. Arancibia, Note, *Statutory Caps on Damage Award in Medical Malpractice Cases*, 13 *OKLA. CITY U. L. REV.* 135, 141 (1988) ("During 1986, fifteen states passed legislation that limited the amount of recovery for noneconomic losses."). For more on tort reform, see generally Edward White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 *VILL. L. REV.* 1265 (1987) (surveying tort reform in the areas of strict liability, comparative negligence, and workers' compensation).

ers in the attempt to reduce litigation.<sup>50</sup> They lobbied lawmakers and continue to shape the public debate about litigation.<sup>51</sup>

In other words, the civil litigation system became a focus of public, corporate, and media attention. The question is whether that focus is valid. In contrast to the media portrayals, scholars like Marc Galanter have disputed the premise that the country is more litigious, citing myriad factors like the growth in the number of lawyers, the complexity of claims, and increased awareness of remedies as reasons why the litigation world looks and feels bigger.<sup>52</sup> The argument proffers that litigation has taken on a more “symbolic presence,” with “more big time, major league litigation involving major institutions and/or pathbreaking claims.”<sup>53</sup> This means that there is “absolutely, if not proportionately, more ‘law stuff’ that invites media coverage with its built-in bias toward the dramatic, the novel, the deviant, toward innovation and conflict.”<sup>54</sup> This affects society’s perception of litigation, but it is not necessarily reality.

The reality, scholars argue, is more nuanced.<sup>55</sup> Although there is no perfect data, historical rates demonstrate that Americans are not necessarily more litigious now than they were a century ago. Moreover, when com-

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<sup>50</sup> See Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1314 (2006) (“Rules [11, 23, and 26] are just a few of the Rules that directly implicate tort-reform issues and have therefore become the subject of debate and the object of lobbying efforts by interest groups such as consumer-advocacy organizations, large corporations, and trial lawyers associations.” (footnotes omitted)); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 677–78 (2008) (“The current wave of tort ‘reform’ is tied to a systematic and coordinated campaign ‘by an army of corporations, foundations, lobbyists, litigation centers, think tanks politicians and academics,’ to unmake or undo developments over the last 100 years across the common law.” (footnotes omitted)).

<sup>51</sup> For example, the U.S. Chamber of Commerce has commended the American Tort Reform Association (“ATRA”) for its annual *Judicial Hellholes* publication. See, e.g., *Judicial Hellholes Report Spotlights Problem Civil Justice Jurisdictions*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 14, 2012), <http://www.instituteforlegalreform.com/resource/judicial-hellholes-report-spotlights-problem-civil-justice-jurisdictions> [<http://perma.cc/35YD-89S3>]. This ATRA publication chronicles what it argues are the worst lawsuit jurisdictions for corporations by “documenting developments in places where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants.” AM. TORT REFORM ASS’N, JUDICIAL HELLHOLES 2013/2014, at 2 (2013), <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf> [<http://perma.cc/6PPS-54AN>] [hereinafter JUDICIAL HELLHOLES 2013/2014].

<sup>52</sup> See, e.g., Galanter, *supra* note 44, at 48, 69–71 (summarizing alternative explanations for the public perception of a “litigation explosion”).

<sup>53</sup> *Id.* at 49–50.

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 69–71 (criticizing “litigation explosion” scholarship, in part, for overstating incomplete data); see also Miller, *supra* note 11, at 990–96 (discussing the alleged litigation explosion and noting that “the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition”).

pared to other countries, the same is true.<sup>56</sup> When one looks at the potential number of grievances a population might have, the actual rates involving a third party, such as a court, are fairly small. For example, one study determined that over twenty-five percent of individuals with middle-range grievances (those defined as worth \$1000 or more) did not take that grievance to the next level, meaning they did not do anything to make the alleged offending party aware of their potential claim.<sup>57</sup> This does not mean that the remaining seventy-five percent of individuals filed a court claim. To the contrary, about two-thirds of these remaining claims led to disputes between the parties, but even then almost half of those disputes ended in agreement without any third-party intervention.<sup>58</sup> In other words, these individuals did not even engage the civil litigation system. As scholars have argued, “[E]mpirical studies show that most Americans do not rush to court with every petty grievance. Notwithstanding occasional silly lawsuits, Americans lump most of their legitimate grievances rather than litigate.”<sup>59</sup>

In spite of these studies, the litigation system is perceived as being fraught with abuse. The combination of an increase in filing rates, decrease in trial rates, and changes in the nature of substantive claims has resulted in a palpable fervor over the civil litigation system. At least one result of this fervor, as this Article will show, is the current efficiency norm.

## II. THE EFFICIENCY NORM

This Part of the Article discusses how institutional actors define efficiency. Rather than considering a range of costs and benefits, the U.S. Supreme Court, Congress, and rulemakers view a particular kind of litigation costs as the near-exclusive concern. This singular focus has given rise to the current efficiency norm.

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<sup>56</sup> See generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (arguing that Americans are not more litigious than they were in the recent past and are not any more litigious than individuals in other industrialized countries).

<sup>57</sup> Galanter, *supra* note 44, at 13–14 (discussing study that defined and quantified “grievances,” “claims,” and “disputes”).

<sup>58</sup> *Id.* at 16–17.

<sup>59</sup> Burbank & Subrin, *supra* note 9, at 403; see also Anne Underwood, *Would Tort Reform Lower Costs?*, N.Y. TIMES: PRESCRIPTIONS (Aug. 31, 2009, 3:45 PM), <http://prescriptions.blogs.nytimes.com/2009/08/31/would-tort-reform-lower-health-care-costs/> [<http://perma.cc/8AMB-HSY8>] (including a discussion with Professor Tom Baker, who argues that the argument that health care costs are driven up by frivolous lawsuits is “ludicrous”).

### A. From Nuance to Simple Costs

#### 1. A Singular Focus on Costs

When Rule 1, describing the scope and purpose of the Federal Rules of Civil Procedure, was adopted in 1938, the words appeared to animate a balance between the need to efficiently administer the civil justice system and to fairly adjudicate litigant claims. It stated that the rules “should be construed to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>60</sup> Currently, the venerable Rule 1 is set to be amended to include the admonition that in addition to construing and administering the rules, the courts and parties must “employ” the rules in order to secure Rule 1’s ends.<sup>61</sup> This proposed change reflects the sense that improvements to the “administration of civil justice regularly include pleas to discourage overuse, misuse, and abuse of procedural tools that increase cost and result in delay.”<sup>62</sup> In other words, in changing Rule 1, the rulemakers’ stated focus is cost, or to put a finer point on it, finding a way to reduce the costs of civil litigation that result from abusive litigation.

This is in contrast to the more nuanced conception of “just, speedy, and inexpensive” proposed by the original rulemakers. Worried about hyper-technical rules of procedure that had been applied to prevent parties from reaching the merits, these rulemakers created a system that was intended to weigh how cost and delay could get in the way of reaching a just outcome:

A complicated procedure is the boon of the sophisticated, the expert, in short for the well-heeled. We need to look back only at the jungle [before the rules], when it was unsafe to appear in the federal courts without a local expert, to see how perilous this was for

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<sup>60</sup> FED. R. CIV. P. 1.

<sup>61</sup> COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 281 (2013), <http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf> [<http://perma.cc/99K8-JS23>] [hereinafter PRELIMINARY DRAFT OF PROPOSED AMENDMENTS].

<sup>62</sup> *Id.* The Committee note continues, “Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.” *Id.* Rule 1 was amended in 1993 to add the words “and administered” after “construed.” Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 298 (2010). This change “was part of a package of amendments aimed at strengthening judicial case management and controlling litigation costs.” *Id.* Absent congressional action, the amendment requiring courts and parties to “employ” the Federal Rules will take effect on December 1, 2015. *Pending Rules Amendments*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/pending-rules-amendments> [<http://perma.cc/7CZM-MZ83>].

all except the few in the know. Now all this is changed in a truly revolutionary way.<sup>63</sup>

The original rulemakers were not exclusively focused on substantive values. As scholars have argued, the values underlying the original rules were “practical values of administrative design, such as efficiency (understood narrowly as minimizing administrative cost), simplicity, and flexibility.”<sup>64</sup> Efficiency, in their minds, meant reaching a result with the least amount of administrative obfuscation.<sup>65</sup> For example, “efficiency” meant having flexible rules of joinder so that if a plaintiff failed to include a defendant originally, the plaintiff could add that party without starting all over.<sup>66</sup> The original rulemakers thought of efficiency not as a straight cost calculation, but as a way to unburden civil litigation of needless administrative distraction.<sup>67</sup> The current focus shifted, it appears, to reaching a result as cheaply as possible. In other words, a premium is placed on assessing the raw cost of each litigation moment without much regard for other potentially more nuanced costs that should be considered. These narrow costs have become the current focus.

The studies conducted in connection with the currently proposed discovery rule amendments are apposite. The most controversial of the proposals is the introduction of the concept of proportionality into Rule 26(b)(1)’s scope of discovery definition. The original rule defined discoverable information as that which was relevant to the litigation. The proposed revision expands that definition to include the idea that the discovery must be “proportional to the needs of the case.”<sup>68</sup> The rule goes on to define proportionality with six factors. Five of these factors are taken from Rule 26(b)(2)(C), which is a section of the discovery rules that explicitly granted the court power to limit discovery. Those factors—whether the “burden or expense of the proposed discovery outweighs its likely benefit,” “the amount in controversy,” “the parties’ resources,” “the importance of the is-

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<sup>63</sup> See Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, in *PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES E. CLARK* 115, 121 (Charles A. Wright & Harry M. Reasoner eds., 1965).

<sup>64</sup> Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 895 (1999); see also David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 380–81 (2010) (arguing that early rulemakers “shared a consistent normative assumption for the proper purpose of procedural rules: they have no independent goals of their own and instead exist to provide for the efficient resolution of cases on their substantive merits”).

<sup>65</sup> Bone, *supra* note 64, at 895 & n.37 (noting that procedure reformers equated efficiency with administrative streamlining).

<sup>66</sup> Marcus, *supra* note 64, at 394–95 (contrasting the historical judicial approach to joinder with the more permissive joinder language of Rule 18).

<sup>67</sup> Bone, *supra* note 62, at 293 (discussing a procedure reformer’s view of efficiency).

<sup>68</sup> PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 61, at 289–90.

sues at stake,” and the “importance of discovery in resolving the issues”—were joined by one additional factor: “the parties’ relative access to relevant information.”<sup>69</sup>

The studies conducted in support of the proportionality change focused on the cost of discovery and whether it was proportional to the value of the case.<sup>70</sup> One study by the Federal Judicial Center found that the median discovery costs for plaintiffs amounted to \$15,000, and the median costs for defendants amounted to \$20,000.<sup>71</sup> A related study determined that higher costs are associated with cases where the parties have more at stake.<sup>72</sup> More specifically, for both plaintiffs and defendants, the study found a 1% increase in stakes was associated with a 0.25% increase in total discovery costs.<sup>73</sup> Critics of proportionality argue that this makes sense. When the parties to the litigation have more at risk, they will spend more to litigate their case. Nonetheless, proponents of the rule change have studies to support their position as well. In a survey by the Institute for the Advancement of the American Legal System, a survey of corporate counsel revealed that 90% of the time these counsel believe that discovery costs in federal court are not proportional to the value of the case.<sup>74</sup> Moreover, the Civil Rules Committee acknowledged that it may only be a small number of cases that experience high discovery costs. Yet, it argued a rule change was in order because those high stakes cases had to be addressed.<sup>75</sup>

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<sup>69</sup> U.S. COURTS, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE—APRIL 2014, at 79–80, 97–98 (2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf> [<http://perma.cc/64Q2-G4QR>] [hereinafter 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE] (reprint of the Report of the Duke Conference Subcommittee). Current Rule 26(b)(2)(C)(iii) reads, “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” FED. R. CIV. P. 26(b)(2)(C)(iii).

<sup>70</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 83.

<sup>71</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) [<http://perma.cc/8WPH-USEZ>]. This study surveyed more than 2000 lawyers (half plaintiff and half defense) for its study and looked at all cases terminated in federal court during the fourth quarter of 2008. *Id.* at 5, 7 n.4, 85.

<sup>72</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5, 7 (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf) [<http://perma.cc/BY2K-WJ4S>].

<sup>73</sup> *Id.*

<sup>74</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 83. One study by the American College of Trial Lawyers Task Force on Discovery found that almost half of the respondents “believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers.” *Id.*

<sup>75</sup> *Id.* at 4–16.

These surveys and the rulemakers' response are revealing with respect to the efficiency norm. All of the studies—whether pro-discovery or anti-discovery—focused solely on the pecuniary cost of discovery. With the exception of the studies that connected the costs to the stakes of the case, the studies made no attempt to contextualize the cost by valuing and evaluating the benefits of the litigation.<sup>76</sup> This shows the widespread belief that efficiency is achieved when reform makes litigation cheaper—without regard to other kinds of costs.<sup>77</sup>

The U.S. Supreme Court is similarly guided by this allegiance to costs. The Court's most recent pleading cases, *Bell Atlantic Corp. v. Twombly*<sup>78</sup> in 2007 and *Ashcroft v. Iqbal* in 2009,<sup>79</sup> both of which held plaintiffs to a higher pleading standard, are illuminating. In *Twombly*, the Court explained that Rule 8 required a stricter reading because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" proceedings such as summary judgment.<sup>80</sup> Similarly, in *Iqbal*, the Court reasoned that "[l]itigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources," requiring the Court to move its focus from the possibility of discovery for plaintiffs to the "burdens of discovery" for the defendants.<sup>81</sup> In other words, the Court explained its decisions, in part, in terms of costs accrued by the defendant in litigation.

This focus on raw costs is found in other cases as well. For example, in the 2011 decision in *AT&T Mobility L.L.C. v. Concepcion*,<sup>82</sup> the Supreme Court rejected plaintiffs' attempt to arbitrate as a class under their commercial agreement with AT&T.<sup>83</sup> Much of the Court's reasoning for requiring bilateral arbitration turned on its determination that class arbitration, unlike

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<sup>76</sup> This is not a product of laziness or lack of intellectual curiosity. It is quite difficult to evaluate the benefit of litigation. See Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 897 (2015) (noting difficulty of quantifying social benefits of litigation).

<sup>77</sup> The studies also demonstrated, and the rulemakers seemed to accept, that discovery costs were high in only a small percentage of cases. Yet, the rulemakers still chose to amend the rules. One explanation for this response is that the rules are transsubstantive and have to address the most complex cases even when those cases are in the minority. A more cynical explanation is that the rulemaking process is captured by entities with a great interest in keeping the cost of these high-stakes cases down. Whatever the reason, however, the bottom line is that costs, even when accrued in a small number of cases, motivated the development of this procedural reform.

<sup>78</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548–49 (2007).

<sup>79</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>80</sup> *Twombly*, 550 U.S. at 559.

<sup>81</sup> *Iqbal*, 556 U.S. at 685–86.

<sup>82</sup> *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1750–51 (2011).

<sup>83</sup> This agreement was a contract of adhesion—a point on which all parties and the Court agreed. *Id.* at 1746, 1756; *Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS AJB, 2008 WL 5216255, at \*9 (S.D. Cal. Aug. 11, 2008) (concluding contract was contract of adhesion and applying unconscionability test for adhesion contracts), *aff'd sub nom.* *Laster v. AT&T Mobility L.L.C.*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* *Concepcion*, 131 S. Ct. 1740.

bilateral arbitration, was not efficient because it “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>84</sup> Class arbitration is generally governed by rules that are based on the federal class action rules.<sup>85</sup> Thus, although bilateral arbitration offers refuge from the slow, costly morass that is our civil litigation system, class arbitration would not.

In other words, the Court was worried that class arbitration would cost more, and thus, be less efficient. The Court did not consider the effect this decision would have on plaintiffs, however. The Court dismissed out of hand the unfairness of contracts of adhesion by noting, “the times in which consumer contracts were anything other than adhesive are long past.”<sup>86</sup> Instead, the Court expressed concern about how the corporate defendants would be affected if they had to engage in class arbitration. The lack of meaningful appellate review in arbitration, the majority thought, would make class arbitration much too risky for businesses. After all, arbitration does not provide for de novo review because review “under § 10 focuses on misconduct [by the arbitration panel] rather than mistake.”<sup>87</sup> The majority explained that given these limitations, “[a]rbitration is poorly suited to the higher stakes of class litigation.”<sup>88</sup> Indeed, “[t]he point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable.”<sup>89</sup> This led the Court to conclude that “defendants would [not] bet the company” if class arbitration was an option for plaintiffs.<sup>90</sup> In other words, to the extent class arbitration looked like civil litigation, defendants would not choose arbitration at all.<sup>91</sup> The costs, under that type of a regime, would be too high. But, once again, the Court did not explicitly assess the

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<sup>84</sup> *Concepcion*, 131 S. Ct. at 1751.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1750.

<sup>87</sup> *Id.* at 1752 (discussing section of the Federal Arbitration Act addressing grounds for vacation and rehearing codified in 9 U.S.C. § 10); see also Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

<sup>88</sup> *Concepcion*, 131 S. Ct. at 1752.

<sup>89</sup> *Id.* at 1752 n.8.

<sup>90</sup> *Id.* at 1752.

<sup>91</sup> As already discussed, it is disputed whether the Court’s critique of the civil litigation system is empirically supported or not. See, e.g., Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77 (1993) (demonstrating that many of the statistics and rhetoric criticizing civil litigation is inaccurate). The *Concepcion* dissent argued that the majority’s assertion that class arbitration was so complex that it would discourage arbitration altogether was unfounded. 131 S. Ct. at 1758 (Breyer, J., dissenting). The dissent stated that the majority had no empirical support for its argument and that comparing class arbitration to bilateral arbitration was the wrong metric. *Id.* at 1760. A more accurate comparison—from the defendant’s perspective—would be to pit class arbitration against class action litigation. That comparison would show that class arbitration is preferable. *Id.* at 1759–60.



costs to the plaintiffs, and further, did not articulate what benefits might result from a system that permitted class arbitration.<sup>92</sup>

Finally, Congress is equally attuned to this narrow definition of costs. For example, in 1996, Congress passed the Prison Litigation Reform Act ("PLRA").<sup>93</sup> This legislation was intended to stem the tide of frivolous prisoner claims, which were arguably costing the federal court system too much in time and resources.<sup>94</sup> Yet, according to some scholars, "[m]any of the provisions deter meritorious cases along with the frivolous, and might not save the federal courts any significant amount of time or money."<sup>95</sup> In other words, Congress did not appear to value the potential cost of losing meritorious claims. In addition, the media played a part in this legislation by focusing the public's attention on extreme cases of frivolous litigation, some of which did not turn out to be so frivolous after all.<sup>96</sup> Other congressional legislation regarding litigation has similarly focused on lowering litigation costs.<sup>97</sup> Like the Court and federal rulemakers, Congress uses a cramped definition of cost when describing its efficiency analysis.

<sup>92</sup> The dissent arguably attempted to make this assessment. See 131 S. Ct. at 1759–61 (Breyer, J., dissenting).

<sup>93</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 to 1321-77 (codified in scattered sections of U.S.C. tits. 11, 18, 28, 42 (2012)); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998).

<sup>94</sup> See Herman, *supra* note 93, at 1277–78 (discussing the cost-cutting measures devised by Congress in the PLRA).

<sup>95</sup> *Id.* at 1231; see also Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1704–05 (2004) ("The Prison Litigation Reform Act thus raised the cost of conducting successful prison reform litigation without changing the substantive law and, at the same time, reduced the resources available to prison reform litigators.").

<sup>96</sup> Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 258–59 (2004) ("Moreover, much of the widely circulating information about frivolous lawsuits—echoed both on the floor of Congress and in the media during the congressional debates on the [PLRA]—was exaggerated or even false. Individual stories were distorted or taken out of context.").

<sup>97</sup> See *infra* note 247 and accompanying text (discussing the Class Action Fairness Act of 2005 ("CAFA")). But see generally *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice? Hearing Before the Subcomm. on Bankr. and the Courts of the U.S. Sen. Comm. on the Judiciary*, 113th Cong. 1–125 (2013) [hereinafter *Changing the Rules*] (a hearing held by the Judiciary Committee to discuss the currently proposed amendment to the discovery rules). The Committee heard testimony from Sherrilyn Ifill, the President and Director-Counsel at NAACP Legal Defense and Education Fund, Inc., Arthur Miller, a Professor at New York University School of Law, and Andrew Pincus, a Partner at Mayer Brown LLP. *Changing the Rules, supra*, at 7–31, 41–78. Much of the focus of the hearing turned on discovery costs. See *Congress Takes Up the Skyrocketing Cost of E-discovery*, U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 6, 2013), <http://www.instituteforlegalreform.com/resource/congress-takes-up-skyrocketing-costs-of-e-discovery/> [http://perma.cc/UXW3-DTNZ]; see also *Changing the Rules, supra*, at 39–40 (statement of Sen. John Cornyn) (arguing that technological advancements have outpaced federal civil rulemaking, resulting in increased costs).

## 2. Public Cost Consciousness

Similar to the institutional actors described above, the media and the public have focused their attention on the simple cost of litigation. The focus is generally not in relation to other costs like the price of inaccurate results or the costs borne by plaintiffs. To the contrary, a narrow cost focus dominates. There are two types of media that appear in this realm. The first is popular media—articles and works focused on reaching a broader audience. The second is, for lack of a better term, lobbying media—articles and papers focused on persuading policy-makers that the cost of litigation needs to be addressed.

As discussed in Part I, the media has focused its attention on litigation. The litigiousness of our nation has been a critical focus, but part of that critique is that litigation costs money. Lawyers are often blamed for this cost. Plaintiffs' lawyers and the contingency fee arrangement, as well as the rejection (in most cases) of a loser-pay litigation system, are blamed for incentivizing bad lawyers to bring bad cases.<sup>98</sup> Yet, even in cases where it is fairly apparent that there was some kind of wrong-doing, the media turns its focus from the wrong-doer to the bottom line: how much is litigation going to cost? For example, coverage of the British Petroleum ("BP") oil spill litigation has highlighted how much litigation is costing the public and even BP itself.<sup>99</sup> The cost is often cast in terms of how it makes individuals' lives worse; the cost of litigation is passed on to the consumer in some fashion.<sup>100</sup>

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<sup>98</sup> See Paul H. Rubin, Opinion, *More Money into Bad Suits*, N.Y. TIMES (Nov. 16, 2010, 4:44 PM), <http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits> [<http://perma.cc/99X7-CL8B>] (arguing that third-party funding of litigation would mainly benefit lawyers, not society, and further arguing that lawyers are to blame for the country's "litigious" nature).

<sup>99</sup> See Associated Press, *\$15M Earmarked for Louisiana's Gulf Oil Spill Litigation*, NEW ORLEANS CITY BUS. (July 18, 2014), <http://neworleanscitybusiness.com/blog/2014/07/18/15m-earmarked-for-la-s-gulf-oil-spill-litigation/> [<http://perma.cc/PZK2-LMGT>]; Sheila Shayon, *BP Gets Burned in Ongoing Deepwater Horizon Litigation*, BRAND CHANNEL (Mar. 4, 2014), <http://www.brandchannel.com/home/post/2014/03/04/140304-BP-Deepwater-Horizon-Litigation.aspx> [<http://perma.cc/AV8R-Q9WA>]. The same was true in the mortgage crisis. See, e.g., E. Scott Reckard, *Bank of America Earnings Tumble 43% on Mortgage Litigation Costs*, L.A. TIMES (Jul. 16, 2014, 9:29 AM), <http://www.latimes.com/business/la-fi-bank-america-earnings-20140716-story.html>; David Reilly, *Big-Bank Bar Tab Keeps Growing*, WALL ST. J. (Jul. 18, 2014, 12:28 PM), <http://online.wsj.com/articles/big-bank-bar-tab-keeps-growing-heard-on-the-street-1405700901> [<http://perma.cc/Z7H4-UY2S>].

<sup>100</sup> See, e.g., Sean Dow, *A Case for Malpractice Reform*, TIMES-NEWS (Aug. 4, 2014, 12:01 AM), <http://www.thetimesnews.com/opinion/opinion-columns/a-case-for-malpractice-reform-1.354490> [<http://perma.cc/359K-7A7X>] (arguing that malpractice claims cost consumers in the form of higher insurance rates and less access to medical care).

This ubiquitous cost-focus demonstrates the degree to which the media's portrayal of litigation detracts from a discussion of litigation's benefits.<sup>101</sup>

In addition, organizations like the American Tort Reform Association ("ATRA") have a pronounced impact on how legislators, and thus the public, view litigation.<sup>102</sup> Each year, ATRA releases a report called *Judicial Hellholes*, which ranks particular jurisdictions according to their relative friendliness to defendants.<sup>103</sup> Similarly, the U.S. Chamber of Commerce has an Institute for Legal Reform, which publishes a report called the *Lawsuit Climate Report*.<sup>104</sup> This report includes a survey of corporate general counsels and defense attorneys, and asks them to assess each state on the basis of "how fair and reasonable the state's tort liability system is perceived to be by U.S. businesses."<sup>105</sup> The U.S. Chamber of Commerce also prepares papers specifically aimed at highlighting the rising cost of litigation for corporations.<sup>106</sup>

All of this work is disseminated to legislators and available to the public, and it undoubtedly has an impact on how both perceive litigation. The negative rhetoric about lawsuits has been repeated so often that, even in the face of strong evidence to the contrary, the narrative lives on. As one scholar observed: "The anti-lawsuit rhetorical messages were repeated over and over by business-funded institutes and Fortune 500 companies and are now omnipresent in popular culture."<sup>107</sup>

Much of that rhetoric focuses not just on the alleged frivolous nature of the claims, but also on the cost. For example, one *Judicial Hellholes* report stated: "California's addiction to lawsuits claims average residents as victims, too. The litigation system there effectively imposed a \$33.5 billion hidden tax—or \$883 per resident—just for the costs of lawsuits settled thus

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<sup>101</sup> For example, some litigation benefits individuals and the public. See Arthur Bryant, *What "Greedy" Trial Lawyers and "Frivolous" Litigation Do*, ACSBLOG (July 22, 2014), <http://www.acsblog.org/acsblog/what-greedy-trial-lawyers-and-frivolous-litigation-do> [<http://perma.cc/SR3E-3XJQ>].

<sup>102</sup> See *About ATRA*, AM. TORT REFORM ASS'N, <http://www.atra.org/about> [<http://perma.cc/XQH4-BL7F>].

<sup>103</sup> See JUDICIAL HELLHOLES 2013/2014, *supra* note 51, at 1–3 (identifying top six geographic areas where courts are perceived as unfair to defendants).

<sup>104</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, LAWSUIT CLIMATE 1 (2012), [http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit\\_Climate\\_Report\\_2012.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf) [<http://perma.cc/2F8T-Z5FR>].

<sup>105</sup> *Id.*

<sup>106</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, INTERNATIONAL COMPARISONS OF LITIGATION COSTS: CANADA, EUROPE, JAPAN, AND THE UNITED STATES (2013), [http://www.instituteforlegalreform.com/uploads/sites/1/ILR\\_NERA\\_Study\\_International\\_Liability\\_Costs-update.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf) [<http://perma.cc/5DG8-MSDX>].

<sup>107</sup> Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1100 (2008).

far in 2013 . . . .”<sup>108</sup> Similarly, the report argued that litigation over certain consumer protection laws “only serves to make plaintiffs’ lawyers richer while it actually hurts consumers—especially disadvantaged consumers—as litigation costs are invariably passed on to them in the form of higher . . . prices.”<sup>109</sup> Although these particular publications discuss state courts and state laws, the rhetoric is the same in response to federal courts. Litigation, in both cases, is evaluated on the basis of its “costs,” whether in terms of cost to the litigant itself or in terms of how that litigation cost is passed on to the public. What is missing from this coverage is a discussion of how litigants and the public might benefit from litigation and how much the loss of that benefit itself costs.

### III. AGAINST THE CURRENT EFFICIENCY NORM

This Part of this Article argues against the efficiency norm as currently defined. Institutional actors’ fidelity to a particular conception of efficiency is highly problematic. First, section A analyzes how a cost-focused definition of efficiency misapprehends the real meaning of efficiency.<sup>110</sup> It accounts for efficiency in terms of simple, measurable costs, and does not value costs that are more difficult to quantify, nor give adequate weight to benefits. Second, section B analyzes how commitment to this version of efficiency has contributed to profound shifts in the underlying presumptions about civil litigation.<sup>111</sup> These shifts have distorted the development of procedural doctrine.

#### *A. Ill-Defined Efficiency*

The focus on simple costs has resulted in an efficiency norm that too narrowly defines efficiency. This section argues that the definition of efficiency incorrectly excludes a comprehensive set of costs that, although admittedly more difficult to quantify, are critical to an accurate measure of efficiency.

#### 1. An Incomplete Definition

Many scholars may think it, but at least one scholar has stated that “[j]ust as war is too important to be left to generals, civil procedure . . . is too important to be left to proceduralists.”<sup>112</sup> Thus, this section begins with

<sup>108</sup> See JUDICIAL HELLHOLES 2013/2014, *supra* note 51, at 7.

<sup>109</sup> *Id.* at 8.

<sup>110</sup> See *infra* notes 112–162 and accompanying text.

<sup>111</sup> See *infra* notes 164–249 and accompanying text.

<sup>112</sup> John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 877 (1987) (discussing procedural

a brief overview of how efficiency has been defined elsewhere, specifically in law and economics literature. Although too vast to properly summarize, this section endeavors to provide a loose sense of the various concerns that animate the concept of efficiency. The goal is to first explain how these concerns are not addressed in the dominant definition of efficiency in procedure today and to second consider how some of these definitions might properly factor into a reclaimed efficiency definition.

Esteemed law and economics scholars have worked to define efficiency in a multitude of settings.<sup>113</sup> There are various nuanced definitions of efficiency in the literature. For example, according to the Pareto theory, “[a] legal rule is efficient if it induces people to behave in such a way that no one can be made better off (in terms of [his or] her own preferences) without making someone else worse off.”<sup>114</sup> Under the Kaldor-Hicks approach, however, “efficiency is defined in terms of the aggregative benefits of an activity outweighing the aggregative costs.”<sup>115</sup> Yet another approach—social welfare maximization—would “deem[] actions or institutions ‘efficient’ to the extent that they increase or improve ‘social welfare.’”<sup>116</sup> In other words, there are variations in how efficiency can be defined. As one scholar noted, “[t]he term ‘efficiency’ has proven to be chameleon-like.”<sup>117</sup> Nonetheless, there is a generalized definition of efficiency upon which most law and economics scholars appear to agree. That is—at its most basic level—efficiency is “the relationship between the aggregate benefits of a situation and the aggregate costs of the situation.”<sup>118</sup>

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scholars’ blind spot to law and economic concerns in the context of examining attorney-client relations in class actions).

<sup>113</sup> See, e.g., Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 3–16 (1982) (evaluating “claims that the goal of antitrust policy should be to promote efficient business behavior and explores the appropriate scope and inherent limitations of the efficiency goal” and summarizing various scholars’ efficiency definitions); Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 78–96 (1992) (reviewing five possible definitions of social efficiency).

<sup>114</sup> Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 688–89 (1986). For a detailed account of the Pareto theory, see VILFREDO PARETO, *COURS D’ECONOMIE POLITIQUE* (G.H. Bousquet et al. eds., 1964); VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* (Ann S. Schwier et al. eds., 1971).

<sup>115</sup> Ora F. Harris, Jr., *The Automobile Emissions Control Inspection and Maintenance Program: Making It More Palatable to “Coerced” Participants*, 49 LA. L. REV. 1315, 1345 n.157 (1989). For a detailed account of the Kaldor-Hicks principle, see J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

<sup>116</sup> Lawson, *supra* note 113, at 78.

<sup>117</sup> Joseph Sanders, *Road Signs and the Goals of Justice*, 85 MICH. L. REV. 1297, 1297 n.4 (1987) (reviewing *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* by Guido Calabresi).

<sup>118</sup> A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7–11 (4th ed. 2011); see also Lawson, *supra* note 113, at 78 (stating that “[i]n its most straightforward sense,

Even this definition is fraught, however. How one measures “costs” and “benefits” necessarily turns on an evaluative judgment about what is a benefit and what is a cost. These measurements are inevitably subjective, and that means that reasonable people can disagree as into which category—benefit or cost—to properly place the same thing.<sup>119</sup> Nonetheless, the idea that efficiency is reached when the net benefits outweigh costs is, for the purposes of this Article, a fair statement of how law and economics scholars would most basically define the term.

In contrast to the law and economics definition of efficiency, the dominant definition of efficiency in the civil litigation context tends to focus solely on making one aspect of litigation cheaper, without regard to the other costs a particular change might create.<sup>120</sup> This construction of costs does not include the necessary nuance and subjectivity. The cost focus is on the literal monetary cost of each litigation moment.<sup>121</sup> One could assail this definition as lazy, but that is arguably unfair.<sup>122</sup> Although focusing on efficiency this way could be attributed to laziness, the more likely reason for assessing only raw costs is simplicity. In other words, the bare cost of each litigation moment is measurable, but measuring costs in a more nuanced fashion is harder and, as discussed below, may not be possible in every case.

The measurability of cost is seen in every aspect of civil litigation. For example, most recently in the rulemaking context, the General Counsel of Microsoft presented a visual aid when testifying before the Civil Rules

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efficiency refers to the ratio of outputs to inputs”). This Article does not engage in the development of law and economics, and specifically the Chicago-style school of law and economics, as a field. Nevertheless, it is worth noting that there is mounting literature criticizing the Chicago-style analysis of the concept of efficiency. See, e.g., Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 191 (1980); Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905–06, 912 (1980); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197 (1997). See generally James R. Hackney Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 322 (1997) (arguing that the “revolution in tort law theory” spawned by neoclassical law and economics “has moved beyond the theoretical and on to policy”).

<sup>119</sup> See Lawson, *supra* note 113, at 61–75 (discussing the subjective nature of valuing utility and goods).

<sup>120</sup> See Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2073–74 (2002) (evaluating claim that alternative dispute resolution is more efficient based on costs).

<sup>121</sup> See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 207–10 (2014). At least one scholar has made a similar observation in the criminal law context by pointing out that “efficiencies” obtained by adjudicating more cases at a quicker pace necessarily includes other undervalued costs. See *id.* This scholarship argues that “the public costs of criminal cases include much more than adjudication; most obviously, they include policing and investigation costs that precede charging, and the punishment expenditures that follow conviction.” *Id.* at 208.

<sup>122</sup> Whether it is politically motivated is another question. No doubt, there are powerful political interests that work to affect the development of procedural doctrine.

Committee. A technicolor pyramid showed the amount of discoverable materials his company produced in litigation and was meant to concretely demonstrate how costly preservation of that material could be for his company.<sup>123</sup> Similarly, at the Duke Civil Litigation Conference, the General Counsel of General Electric expressed concern over the amount of money his company spent on litigation, quoting an astronomical number for the audience.<sup>124</sup> Finally, studies that quantify how much companies spend on litigation, and specifically discovery, abound. Recently, Senator Jon Kyl wrote an editorial in the *Wall Street Journal* to encourage corporate defendants to participate in the civil rulemaking process, and he quoted these kinds of studies, pegging the cost of discovery in absolute numbers that look quite staggering.<sup>125</sup>

This measure of cost does not just appear in civil rulemaking, however. It is also part of the Judiciary's framing of efficiency. For example, in *AT&T Mobility L.L.C. v. Concepcion*, *Ashcroft v. Iqbal*, and *Bell Atlantic Corp. v. Twombly*,<sup>126</sup> as discussed in previous sections, the Supreme Court examined the procedural problems before it with reference to the simple "costs" of

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<sup>123</sup> See *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before Judicial Conf. Advisory Comm. on Civil Rules*, 79–81 (Jan. 9, 2014), <http://www.uscourts.gov/file/9446/download> [<http://perma.cc/KV55-5CMN>] [hereinafter *January 2014 Public Hearing*]. Microsoft's attorney David M. Howard stated:

To put it another way, for each page that is actually used in evidence, we produce 1,000 pages, review 4,000 pages, process 120,000 pages, and preserve over 670,000 pages. Depending on the [type] of case, we spend 30 to 50 percent of our out-of-pocket litigation dollars on discovery. In the last decade, we paid about \$600 million in fees.

*Id.* at 80.

<sup>124</sup> See Alexander Dimitrief et al., *Update on the Federal Rules Advisory Committee*, 7 J.L. ECON. & POL'Y 211, 226–31 (2010) (edited transcript from the George Mason Judicial Education Program's Fifth Annual Judicial Symposium on Civil Justice Issues, wherein General Electric's General Counsel Alexander Dimitrief summarizes testimony delivered at Duke Civil Litigation Conference regarding corporations' litigation expenses). A survey of thirty-six Fortune 200 companies, conducted by the Searle Center on Law, Regulation, and Economic Growth, showed that "[a]s of 2008, the average respondent reported nearly \$115 million total annual litigation costs (which exclude awards and settlements), having risen from \$66 million in 2000." LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP., U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES app. 1, at 7 (2010), <http://www.uscourts.gov/file/document/litigation-cost-survey-major-companies> [<http://perma.cc/9V9S-S6GP>]. Among the thirty-six survey respondents, "the total aggregate spen[t] on litigation in 2008 was \$4.1 billion." *Id.* at 4.

<sup>125</sup> See Jon Kyl, *A Rare Chance to Lower Litigation Costs*, WALL ST. J. (Jan. 20, 2014, 6:21 PM), <http://online.wsj.com/news/articles/SB10001424052702304049704579321003417505882> [<http://perma.cc/R2ZM-WFYG>].

<sup>126</sup> *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1750–51 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548–49 (2007).

class actions and the simple “costs” of discovery.<sup>127</sup> Congress is equally complicit in this framing of costs. In the run-up to the adoption of the Private Securities Litigation Reform Act and the Prison Litigation Reform Act, the record is replete with references to the cost of litigation. For example, Senator Pete Domenici complained that lawyers were garnering high fees from securities litigation, leaving the investor with little to show for the lawsuit.<sup>128</sup> He argued that “[i]t is not worth the consequences to the enterprises being affected that normal litigation brings to the marketplace of American capitalism,” and called the resulting litigation system “eccentric” and full of “deep pocket lawsuits.”<sup>129</sup> When discussing the PLRA, then-Senator Bob Dole stated: “The National Association of Attorneys General estimates that inmate civil rights litigation costs the States more than \$81 million each year. Of course, most of these costs are incurred defending lawsuits that have no merit whatsoever.”<sup>130</sup> He lamented that so many lawsuits were being filed “free of charge,” with “no court costs” and “no filing fees.”<sup>131</sup> He argued, “This is outrageous and it must stop.”<sup>132</sup>

Nonetheless, there are myriad problems with defining efficiency in terms of costs alone. First, there are costs that are not easily quantifiable. For example, what is the cost to society when the outcome of litigation is not accurate? Assuming the defendant won when it should not have, there are costs in terms of deterrence. That defendant and others like it will not be deterred from potentially harmful and otherwise costly behavior.<sup>133</sup> The cost of that behavior is absorbed elsewhere, through higher insurance rates, individual spending, and the like. Conversely, if the plaintiff wrongly prevails, there are also costs that are difficult to quantify. That litigation might spur other potential plaintiffs to engage in wasteful litigation, and the defendant will pay those extra costs or pass them on to consumers. Moreover, if litigation is perceived to be inaccurate—even assuming it most often reaches accurate results—there is a cost. To the extent society lacks faith in the civil justice system, then parties may take their litigation elsewhere (at an arguable cost) or they may refrain from litigating at all (again at a cost, assuming, for

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<sup>127</sup> See *supra* notes 79–85 and accompanying text (discussing the focus on discovery and class action costs in recent Supreme Court decisions).

<sup>128</sup> 141 CONG. REC. 35,302–03 (1995) (statement of Sen. Domenici).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 26,548 (statement of Sen. Dole).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 430–31 (1999) (noting that in the employment discrimination context, “[g]eneral deterrence more effectively induces compliance with the law than specific deterrence [because] it reaches a broad class of potential offenders [and] [i]t also creates spill-over effects: punishment of one violation has a generalized deterrent effect on other, related violations”).



example, that the litigation would have had a beneficial deterrent effect).<sup>134</sup> As discussed in greater detail in Part IV, institutional actors often do not even endeavor to quantify these costs, rendering the working definition of efficiency incomplete.<sup>135</sup>

The current efficiency norm is not only problematic because it fails to measure costs in a nuanced fashion. It also creates opportunities for misguided decision-making because institutional actors may cherry-pick numbers without engaging in a rigorous cost-benefit analysis. For example, the proposed discovery amendments, most notably the requirement that discovery be “proportional,”<sup>136</sup> have sparked a debate about how much discovery really costs. The Civil Rules Committee has studied empirical data,<sup>137</sup> heard from literally thousands of plaintiffs and defense attorneys,<sup>138</sup> and met numerous times to discuss this controversial proposal.<sup>139</sup> Yet, many scholars have argued that the data used by the Committee was inaccurate, or in the very least incomplete. One scholar has argued that “[d]ecades of empirical work . . . support[] the view that the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost is proportional to the amount at stake.”<sup>140</sup> Like the litiga-

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<sup>134</sup> The tension between these two conceptions of justice was articulated by Jeremy Bentham as real justice and apparent justice. See JEREMY BENTHAM, *Principles of Judicial Procedure*, in 2 THE WORKS OF JEREMY BENTHAM 1, 21 (John Bowring ed., 5th ed. 1843). He wrote:

That a system of procedure be good—that it be well adapted to its proper end, it is not sufficient that the decisions rendered in virtue of it be conformable to real justice; it is necessary that they should be conformable to apparent justice: to produce real justice, the only true way is to produce that which shall in the eye of public opinion be apparent justice. In point of utility, apparent justice is everything; real justice, abstractly from apparent justice, is a useless abstraction, not worth pursuing, and supposing it contrary to apparent justice, such as ought not to be pursued.

*Id.*

<sup>135</sup> See *infra* notes 250–272 and accompanying text (arguing that courts and professional legal organizations should do more to take into account non-monetary litigation costs).

<sup>136</sup> U.S. COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE–MAY 2014, at 63–76 (2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks> [<http://perma.cc/L9HG-KR4H>] [hereinafter 2014 COMM. ON RULES OF PRACTICE AND PROCEDURE] (enclosing Memorandum from the Honorable David G. Campbell, Advisory Committee on Civil Rules, to the Honorable Jeffery S. Sutton, Chair of the Committee on Rules of Practice and Procedure, discussing “proportionality”).

<sup>137</sup> *Id.* at 65–67.

<sup>138</sup> Approximately 2300 public comments were submitted and 120 witnesses testified in response to the most recent Civil Rules package. See CTR. FOR CONSTITUTIONAL LITIG., PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 2 (2014), [http://www.cclfirm.com/files/Report\\_050914.pdf](http://www.cclfirm.com/files/Report_050914.pdf) [<http://perma.cc/4FZS-TYPU>].

<sup>139</sup> See 2014 COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 136, at 63 (noting that multiple hearings were held regarding proposals).

<sup>140</sup> Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1089 (2012).

tion explosion narratives discussed in Part I,<sup>141</sup> the actual data runs counter to the narrative underlying the current definition of efficiency that institutional actors employ.

Moreover, beyond the use of incomplete efficiency data, another inherent risk in how institutional actors quantify cost in the efficiency norm is their dependence on anecdotal evidence. For example, the *Twombly* Court contended that discovery costs in the antitrust context were unusually high.<sup>142</sup> Although this may in fact be the case, much of the evidence cited was anecdotal at best. The Court cited a *New York University Law Review* student note to support its assertions regarding discovery costs.<sup>143</sup> Yet, that note admitted that it relied on “[a]necdotal evidence suggest[ing] that defendants unable to shift the costs of complying with requests for electronic documents [in antitrust] . . . [felt] pressured to settle lawsuits to avoid the discovery costs.”<sup>144</sup>

Similarly, when the Civil Rules Committee decided whether to eliminate Rule 26(b)(1)’s subject matter expansion of relevance, the Committee members made the initial decision to do so by asking themselves—and only themselves—whether they had ever seen that provision used in practice. Having answered in the negative, the Committee moved forward with the change.<sup>145</sup> This change was not expressly related to quantifying cost, but it is an example of how the Committee can fall victim to relying on anecdotal evidence, as opposed to a more nuanced analysis, when making changes to procedural doctrine.

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<sup>141</sup> See *supra* notes 22–59 and accompanying text (discussing public and media outcry regarding the alleged litigation explosion).

<sup>142</sup> See 550 U.S. at 558.

<sup>143</sup> *Id.* (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003)).

<sup>144</sup> Wagener, *supra* note 143, at 1898. The Court also cited a Memorandum from Paul V. Niemeyer, Chair of the Advisory Committee on Civil Rules, to the Honorable Anthony J. Scirica, Chair of the Committee on Rules of Practice and Procedure, dated May 11, 1999. *Twombly*, 550 U.S. at 559, 357 (2000). The Court cited the memorandum for its report “that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed.” *Id.* (citing 192 F.R.D. 354, 357 (2000) (noting the substantial costs of discovery when it is used)). Yet as already discussed, discovery costs, according to other studies, are more aligned with the stakes of the case than simply expensive. See *infra* notes 150–155 and accompanying text (discussing studies evaluating connection between discovery costs and stakes).

<sup>145</sup> See *January 2014 Public Hearing*, *supra* note 123, at 132. Judge David G. Campbell stated:

One of the things I think we discussed on the Committee in eliminating the subject matter reference was that nobody on the Committee, as I recalled when we discussed it, lawyer or judge, had ever heard anybody request a good cause extension to subject matter. Everything was focused on relevancy. And that seemed to be the arena in which all of the discovery decisions were made.

The final danger of this simplified cost-focus is that it puts a thumb on the scale in favor of institutional actors' own experiences. The data is so one-note that actors cannot help but rely on their own experience with civil litigation when making policy decisions. Yet, Congress, rulemakers, and the judiciary are dominated by largely elite actors.<sup>146</sup> As one scholar has argued, the "elite" institutional actors "tend to have a limited and spotty grasp of what the bulk of the legal system is really like."<sup>147</sup> They identify things like discovery abuse, which occur in a relatively small number of cases, as a "general problem[]" that must be fixed on a systemic level.<sup>148</sup> In effect, the debate is being shaped by a small group of individuals with very specific experiences and perspectives on what is efficient. Further, these individuals are more likely to be influenced by corporate interests by virtue of those entities' ability to gain access to them. This means that there is a tendency to frame costs in a self-serving, but not necessarily accurate, way.

Because costs are so critical to accurately assessing efficiency, when costs are not accurately quantified, efficiency becomes a less meaningful term. Accordingly, the next section addresses how, in addition to ill-conceived "costs," the efficiencies allegedly obtained under the current efficiency norm might also be problematic.

## 2. Efficiencies—No Matter How Defined—May Not Be Obtained

If efficiency is ill-defined for the reasons described above, that inaccuracy may still be tolerable if the changes being made in the name of efficiency are actually making the civil litigation system better. The question is how to make that assessment, especially because there is not yet a fully functional term for efficiency.<sup>149</sup> This section argues that the changes are not working. First, it is unlikely, or at least unknown, whether these changes are

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<sup>146</sup> Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rule-making*, 39 N.M. L. REV. 261, 278–86 (2009) (discussing how the rulemaking agenda has been set by an elite subset of the lawyer population); see also Carl Tobias, *Diversity on the Federal Bench*, 87 WASH. U. L. REV. 1197, 1197–98 (2010) ("Minorities and women have long been underrepresented on the bench. Caucasians constitute 84 percent of lower court judges. . . . A female judge has never served on 12 of the 94 districts, while people of color have yet to be jurists in even more districts." (footnotes omitted)); Erin Banco, *Report Says Congress Is More Diverse and More Divided*, N.Y. TIMES: THE CAUCUS (July 9, 2013, 4:57 PM), <http://thecaucus.blogs.nytimes.com/2013/07/09/report-says-congress-is-more-diverse-and-more-divided/> [<http://perma.cc/QYD7-B5Z7>] (finding that even though Congress currently has a record number of women and racial minorities, it is still a predominantly white, male institution).

<sup>147</sup> Galanter, *supra* note 44, at 61; see also Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909 (1989) (stating that businesses' concerns about judicial caseloads are a "weapon of perception, not substance").

<sup>148</sup> Galanter, *supra* note 44, at 61.

<sup>149</sup> See *infra* notes 250–272 and accompanying text.

actually lowering costs. For example, these changes may simply shift the money that might have been spent on trial to other costly procedural moments like discovery and summary judgment. Second, in a redefined concept of efficiency, even assuming that raw costs are lowered, the unknown costs to other parts of the system prevent an accurate assessment of whether the current efficiency norm is making the system more efficient.

The first question is whether the shifting civil litigation norms are actually making litigation cheaper. On that count, existing data point in multiple directions. As discussed above, studies demonstrate that discovery, in the run of cases, is not that expensive. Median costs of \$15,000–\$20,000, with increases that appear to directly relate to the stakes in the case, seem reasonable.<sup>150</sup> Notwithstanding, other studies show that in these high-stakes cases, the discovery costs can be quite substantial. In one study by the RAND Institute for Civil Justice, the median discovery costs were \$1.8 million.<sup>151</sup> Yet this study looked at only eight “very large corporations” for its data and reviewed only forty-five cases.<sup>152</sup> Another 2010 study surveyed Fortune 200 companies and found that 2006–2008 discovery costs ranged from \$620,000 to \$3 million per case.<sup>153</sup> It is certainly true that these numbers—on their face—seem substantial. But the study ignores a couple of important contextualizing statistics. The median revenue of Fortune 200 companies in 2011 was \$25 billion.<sup>154</sup> Thus, even assuming that the average cost of discovery in each case is \$2.5 million (an estimate that runs on the high end), this is only 0.01% of those companies’ median revenues. Although the numbers are large, these studies demonstrate that high stakes cases result in higher costs. Moreover, they reveal that discussing the cost of litigation without contextualizing the wherewithal of each litigant is misleading.<sup>155</sup>

Thus, these discovery studies cannot tell us everything we need to know. Unfortunately, studies outside of the discovery context are even more limited. For example, if the trial is vanishing, in part, because of higher rates of summary judgment, is that saving the system money? In 1983, a group of scholars studied “ordinary cases” and determined that trials ac-

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<sup>150</sup> See *supra* notes 71–72 and accompanying text.

<sup>151</sup> NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 17 (2012), [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf) [<http://perma.cc/6XKR-M3BH>].

<sup>152</sup> *Id.* at 7, 17.

<sup>153</sup> Ky1, *supra* note 125 (discussing discovery cost survey).

<sup>154</sup> *Largest U.S. Corporations*, FORTUNE, May 23, 2011, at F-28.

<sup>155</sup> See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1938 (2009) (stating that “over the course of its existence, despite the revolution worked by [the discovery scheme], [it] has seen very little in the way of systematic empirical study”).

counted for less than ten percent of the time lawyers spent on cases.<sup>156</sup> This was in stark contrast to motion practice and discovery, which other scholars found had a much greater impact on the amount of time lawyers spent litigating a case.<sup>157</sup> This seems to indicate that the loss of the trial is not saving us much. This study is old, however, and little work has been done since to quantify the costs of having a trial or not.<sup>158</sup> As for the efficiency gains of summary judgment, we simply do not know if there are any—partly because the studies have not been done, but also because it seems impossible to structure a study that could capture that data.<sup>159</sup>

Because the data on the cost of litigation is limited, controversial, and, in some cases, incomplete, that leaves scholars to assess whether the shifts in civil litigation norms have lowered costs by using anecdotal evidence, or “anec-data.” As stated earlier, anecdotal evidence is a poor substitute for accurate empirical work, but in the absence of empirical data, it may be all we have. Even with regard to anecdotal evidence, however, there is little agreement. Some judges argue that procedural innovations like summary judgment motions have created greater cost. One judge stated that: “The time spent on summary judgment motions in my chambers has ballooned over my eighteen years of service. It is far and away the most time-intensive activity of any chambers’ function. It has become the large bulge in the python.”<sup>160</sup> Yet, other judges have reported that they spend too much time on

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<sup>156</sup> See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 80–85 (1983). Trubek looked at 1649 state and federal civil lawsuits from five judicial districts. *Id.* The study excluded disputes where the initial claim was less than \$1000, as well as thirty-seven “megacases.” *Id.*

<sup>157</sup> *Id.* at 104.

<sup>158</sup> See D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 890 (2006) (“The available empirical data are insufficient to answer the question of whether summary judgment is efficient.”).

<sup>159</sup> See Clermont, *supra* note 155, at 1941 (“Despite summary judgment’s importance, our knowledge of its workings has always been scanty.”); Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 706 (2012) (summarizing the summary judgment studies done to date, arguing that “a key inquiry is missing: a systematic study of what is happening in summary judgment on the ground,” and further arguing that using “existing [empirical] work to make principled arguments about the pros and cons of summary judgment will always fall short”).

<sup>160</sup> Mark W. Bennett, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 704 (2013). Judge Bennett wrote:

Virtually none of the legal academy’s writing on the subject of the state of summary judgment, or the empirical research on the subject, ever touch on the enormous burden the expanded summary judgment industry places on federal district court judges and the inevitable adverse consequences on our other work. Judge Hornby insightfully observes that “judges and magistrate judges must be careful that their chambers’ investment of substantial time and energy assessing motions does not sublimi-

discovery and that they find it wasteful.<sup>161</sup> To counter this, studies have shown that most lawyers and judges anecdotally believe that discovery is proportional.<sup>162</sup> In other words, like the empirical work that has been done to date, the anecdotal evidence is equally indeterminate. Whether costs are actually going down as a consequence of the current efficiency norm is unknown.

Nonetheless, even assuming that costs have gone down because of the efficiency norm, the current efficiency definition still falls short. This is because the definition does not accurately reflect the benefits of civil litigation, nor does it account for costs outside of raw process costs. To put a finer point on it, efficiency as currently defined does not include the benefits of successful litigation, the costs of inaccurate results, and the systemic deficiencies of a system that no longer provides a public forum. Part IV of this Article further explores these missing parts of the definition of efficiency.<sup>163</sup>

### B. *Shifting Litigation Presumptions*

This section discusses how the existing efficiency norm has contributed to two shifts in presumptions about how the civil litigation system functions: the shift from trial to “not trial” and from plaintiff receptivity to plaintiff skepticism. Different institutional actors have validated each of these shifts. These shifts have been justified in part by the efficiency norm;<sup>164</sup> further, these shifts have profoundly changed the civil litigation system.

Scholars, including Rick Marcus and Ben Spencer, have observed that the “ethos” that informs the development of procedural doctrine has shifted from a liberal to a restrictive one.<sup>165</sup> This Article does not challenge that claim. Different from observing and naming a shift in the ethos of procedural doctrine, however, this Article argues that the efficiency norm has often been used to justify a shift in how institutional actors believe that the system should work. In other words, scholars have accurately assessed a symptom of the efficiency norm without fully diagnosing the origin of that symptom. It is the efficiency norm that is partly responsible for motivating

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nally counsel *granting* them so as to justify the investment.” In my experience, in nine out of ten cases, it would be less time-consuming to try the case to a jury than rule on the bulge in the python.

*Id.* (footnote omitted).

<sup>161</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69.

<sup>162</sup> *Id.*

<sup>163</sup> See *infra* notes 250–272 and accompanying text.

<sup>164</sup> The Article is not arguing that the efficiency norm is the sole cause of these shifts. Concerns about accuracy, certainty, increased activity in the court system, and the politicization of the civil litigation system—to name just a few—contribute to these shifts as well. So although the efficiency norm is a critical part of the causation for these shifts, it is not entirely responsible.

<sup>165</sup> See Marcus, *Confessions*, *supra* note 12, at 109.

institutional actors to shift their presumptions about how the civil litigation system should work because they believe those presumptions result in greater efficiency. Yet, as argued in the previous section, the efficiency definition relied upon is deeply flawed. This section argues further that the shifts in presumptions that the efficiency norm has created are similarly questionable.

## 1. From Trial to Not Trial

The first shifting presumption is from the presumption that a merits-based trial is the goal to a presumption that a non-trial exit is the norm. As this section demonstrates, rulemakers, legislators, and judges make decisions reflective of the idea that that trial is no longer the ultimate endgame in civil litigation.

As discussed in the previous section, from 1962 to 2004, the total number of civil cases terminated increased by 400%, but the number of trials fell by 32%.<sup>166</sup> In other words, there are a lot more cases and they are terminating in high numbers, but they are not being resolved through trial. Exactly what is happening in these cases is harder to determine than one might anticipate, however. For example, data captured by the Administrative Office of the Courts tracks the number of terminated cases by categories,<sup>167</sup> but the categories do not shed much light on exactly how the cases are resolving.<sup>168</sup> The numbers provide information regarding timing, but leave open the question of exactly how the cases end.

Some scholars have argued that settlement is the primary mode of resolution.<sup>169</sup> The problem is that there is no specific information about settlement rates—there are only estimates. For example, settlement rates are often pegged at 85–95%.<sup>170</sup> Others have set the rate a bit lower and question

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<sup>166</sup> Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7–8; see *supra* notes 22–58 and accompanying text (discussing the declining annual number of civil trials since 1938, when the Federal Rules were adopted).

<sup>167</sup> See TABLE C-4, *supra* note 26, at 1. The court statistics categorize the cases as follows: (i) those that terminated with “no court action,” so presumably either by voluntary dismissal, alternative dispute resolution, or settlement; (ii) those terminated “before pretrial,” meaning before any dispositive motions have been filed before the court; and (iii) those terminated “during or after pretrial,” meaning cases terminated during or after a dispositive motion like summary judgment has been filed. In 2014, those absolute numbers were (i) 53,771, (ii) 175,990, and (iii) 27,397, respectively.

<sup>168</sup> Galanter, *supra* note 166, at 7 n.1 (noting government records track cases terminated “during or after trial” instead of more precisely identifying when and how cases terminated).

<sup>169</sup> Glover, *supra* note 13, at 1725 (“Normative disagreements [about the value of settlement] aside, however, scholars agree on one thing: Settlement is here to stay.”).

<sup>170</sup> Marc Galanter & Mía Cahill, “Most Cases Settle”: *Judicial Promotions and Regulation of Settlement*, 42 STAN. L. REV. 1339, 1339–40 (1994).

the way settlement is defined.<sup>171</sup> The bottom line is, however, that most cases settle.

What all of these statistics demonstrate is that trials have indeed decreased over the last forty years. Whether settlement has increased or held steady is harder to tell because the data are inexact.<sup>172</sup> It is worth noting, however, that even when the Federal Rules of Civil Procedure were adopted, trial rates were not high. Even when trials were thought to be the norm, the rate of actual trials ranged from 12–20%.<sup>173</sup> Although the rate of trials has decreased, stating that it has decreased without valuing that decrease risks overstating the metric. It is important to appreciate this point when debating what the systemic presumptions should be; even when the presumption is trial, that does not necessarily mean that a high percentage of cases will culminate in that result. The prevailing presumption in the early years of the Civil Rules was that the parties prepared the case for resolution on the merits, whether through trial or otherwise. In contrast, the current presumption is that the parties will prepare the case for early resolution without resort to trial. Thus, preparation for adjudication on the merits is no longer a guiding principle.

### *a. Helicopter-Judging*

How courts adjudicate cases provides the primary example of how the norms undergirding the civil litigation system have shifted from a concern with resolving cases on the merits to a concern with resolving cases—period. As discussed, statistics tell us that even in the 1940s, not all cases were resolved through trial.<sup>174</sup> Nevertheless, the attitude was that the purpose of the civil litigation process was to narrow down issues for trial. The goal was to weed out issues that were not triable before a jury, and to adjudicate the remaining issues as necessary. The judge was largely left out of

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<sup>171</sup> *Id.* The term “settlement” can communicate the idea that the parties, on their own, arrive at terms of settlement. Yet most cases settle as a result of negotiations after a court has decided a dispositive motion or part of a deal reached through alternative dispute resolution. *Id.* at 1340–41. In other words, settlement occurs as part of the adjudicative system, and it is misleading to say that settlement happens in “most cases” without pointing out that many of those cases interact to some degree with the civil litigation system at large. *Id.*; see also John Barkai & Elizabeth Kent, *Let’s Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts*, 29 OHIO ST. J. ON DISP. RESOL. 85, 109 (2014) (arguing that settlement rates are chronically overstated and finding, based on the authors’ own empirical data, that “88% of tort cases, 54% of contract cases, 55% of ‘other,’ and 70% of ‘all’ cases settled” in 2007).

<sup>172</sup> See Galanter & Cahill, *supra* note 170, at 1339–40 (discussing settlement rate estimates).

<sup>173</sup> See *supra* notes 22–59 and accompanying text (discussing historical trial rate estimates).

<sup>174</sup> See *supra* notes 22–59 and accompanying text (discussing historical trial rate estimates).



the process until the moment at which he or she was needed to address those remaining meritorious issues.

Today's world is different. Instead of intervening only to reach the merits, judges are engaged in the litigation process from the start. They are expected to "manage" the cases, and moreover, they are expected to push the cases toward a non-trial exit. They are—in modern terms—helicopter-judging.<sup>175</sup> This shift in the norm about what civil litigation's endgame should be is demonstrated in myriad ways by the judges themselves and the rules they abide by.

For example, as Professor Judith Resnik argued in her seminal article *Managerial Judges*, during the late 1960s to early 1970s, the role of federal judge began to shift.<sup>176</sup> Because of higher workloads and a sense that judges were not doing enough, as well as the "litigation explosion" already discussed, judges began to respond by developing procedures for adjudicating cases more quickly.<sup>177</sup> Congress also engaged by creating the Federal Judicial Center, which was tasked with teaching judges how to better manage their cases.<sup>178</sup> The attitudes toward judging began to change, and the focus, more and more, became trying to figure out how to move cases efficiently through the system.

The origin of this focus on management can be traced to the tension created by discovery.<sup>179</sup> When the Rules were adopted in 1938, they set up system that "embodied contradictory mandates."<sup>180</sup> On the one hand, the discovery rules required a lawyer to hand over relevant information, but on the other hand, the adversarial system required the lawyer to represent clients zealously.<sup>181</sup> This tension led to a necessity of judicial refereeing.<sup>182</sup> Judges needed to be more engaged in order to resolve and "manage" discovery disputes.<sup>183</sup> Once engaged, the floodgates opened, and the judges became more and more involved in every step of the litigation process.

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<sup>175</sup> This term is a riff on the term "helicopter-parenting." Merriam-Webster defines a helicopter parent as one "who is overly involved in the life of his or her child." *Helicopter Parent*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/helicopter%20parent> [<http://perma.cc/67MN-VTZX>].

<sup>176</sup> Resnik, *supra* note 42, at 378, 379–99 (arguing judges have an increasingly managerial role in litigation). *But see* E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 307–08 (1986) (generally arguing that managerial judging is a good result, given the nature of the procedural regime).

<sup>177</sup> Resnik, *supra* note 42, at 398.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 378.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 378–79.

<sup>183</sup> *Id.*

The Civil Rules have followed suit and further expanded this phenomenon. The Rules—specifically the discovery rules—reflect this sense that judges should be more engaged in the nitty-gritty of litigation.<sup>184</sup> When the Rules were adopted, discovery was viewed as an activity that took place largely outside the purview of the courts. But, as an Advisory Committee note explained in 1983, “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”<sup>185</sup> The Advisory Committee note to the current discovery rules states that “the amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.”<sup>186</sup> The note explained that party management was preferred, but argued that “there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.”<sup>187</sup>

This intense focus has led judges to become more engaged in encouraging parties to find non-trial exits from the litigation. Just as judges were not historically expected to develop cases, but now are, they were also not expected to settle cases, but now are.<sup>188</sup> Pushing cases toward settlement used to be taboo. One court explained that were a judge to “persist at settlement efforts and then hear the case and render judgment,” it would “inevitably raise[] . . . suspicion as to the fairness of the court’s administration of

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<sup>184</sup> *Id.* at 391 (arguing that managerial judging is the result of both “(1) changes in the role of judges necessitated by procedural innovations and the articulation of new rights and remedies” and “(2) changes initiated by judges themselves in response to work load pressures”).

<sup>185</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 102.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* Other Civil Rules similarly provide as much. Rule 16, for example, was amended in 1983 to require the judge to issue a scheduling order. See FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment, subdivision (b): Scheduling and Planning. According to the Advisory Committee’s note, this “mandatory scheduling order encourages the court to become involved in case management early in the litigation.” *Id.* Instead of waiting for the parties to bring their dispute to the judge, Rule 16 requires the judge to engage from the outset. See *id.* r. 16(b) (requiring presiding judge to issue a scheduling order). Rule 16 also created the option for a scheduling conference where the judge could meet with the parties early in the litigation. See *id.* r. 16 advisory committee’s note to 1983 amendment, subdivision (b): Scheduling and Planning. By all accounts, this conference option has been used to different degrees by judges, but many lawyers report that they are regularly required to appear before judges under Rule 16. These early “management” meetings invest the judges in overseeing the entire case and not just adjudicating the narrowed-down merits disputes. In fact, summary judgment may be next for the “case management revolution.” See Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 519–20 (2012) (arguing that the same judicial management ethos seen in Rules 16 and 26 should be imported into summary judgment).

<sup>188</sup> Resnik, *supra* note 42, at 384–85 (noting judges previously had limited roles in efforts to settle cases).

justice.”<sup>189</sup> This tended to be the view of most judges until the last forty or so years. Now, settlement, alternative dispute resolution, and the like are the watchwords. As one judge stated: “[M]y goal is to settle all my cases . . . . Most of the time when I try a case I consider that I have somehow failed the lawyers and the litigants.”<sup>190</sup> Another judge observed that the volume of cases and pressure to avoid trial has led “some judges [to] do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.”<sup>191</sup> In fact, in many districts, by local rule, judges are required to funnel parties into some form of alternative dispute resolution, believing that the issues will be resolved or otherwise settled as a consequence.<sup>192</sup>

All of this means that the presumptions about a judge’s role have switched from one focused on deciding issues when parties requested the intervention to one focused on shepherding the case to its end. This end is no longer presumed to be resolution on the merits and preparation for trial, but is instead presumed to be a non-trial exit. To be sure, there are exceptions to this trend,<sup>193</sup> but they are just that—exceptions.

<sup>189</sup> *Id.* at 385 & n.52 (quoting *Krattenstein v. G. Fox & Co.*, 236 A.2d 466, 469 (Conn. 1967)).

<sup>190</sup> David Neubauer, *Judicial Role and Case Management*, 4 JUST. SYS. J. 223, 228 (1978) (quoting a conversation the author had with Fred J. Cassibry, Federal District Court Judge in the Eastern District of Louisiana from 1966 to 1987).

<sup>191</sup> Judge Richard Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999). Judge Richard Arnold goes on to state:

I wish that judges, instead of worrying about how to get rid of a case without deciding it on the merits, would just sit down, pick up the next case, and decide it, and not worry so much about the other 500 cases that are sitting on their desk. You can do only one thing at a time. And if when you’re doing that one thing, your mind is on the next thing, you’re not going to do it very well.

*Id.*

<sup>192</sup> See, e.g., Jonathan D. Asher, *Focus on Fairness: When Low-Income Consumers Face Court-Mandated ADR*, 14 ALTERNATIVES TO HIGH COST LITIG. 119, 119 (1996) (finding that “[m]ore and more frequently, alternative dispute resolution is being mandated by judges and judicial systems as a prerequisite to trial”); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 156–57 (stating that although the Federal Rules of Civil Procedure instruct judges to “explore settlement as well as the use of alternative forms of dispute resolution” at pre-trial conferences, “[s]ome local district rules go yet further”; “[f]or example, in the federal trial courts in Massachusetts, a judge is required to raise the topic of settlement at every conference held with attorneys”); Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 209 (2007) (stating that Federal Rule 16(c) gives judges the discretion to “take appropriate action with respect to . . . settlement . . . when authorized by statute or local rule,” although other federal law requires that each district court “authorize, by local rule . . . the use of alternative dispute resolution processes in all civil actions . . . to encourage and promote the use of alternative dispute resolution” (citations omitted)).

<sup>193</sup> See Bennett, *supra* note 160, at 716–17 (arguing that summary judgment should be eliminated, in part, so that cases can be tried).

### *b. Putting Procedural Pieces Together*

Federal procedure is constructed by the federal civil rulemaking process, the federal courts, and Congress. By looking at how these institutions have approached procedural doctrine over the past approximately eighty years, one can see how the presumptions regarding trial have shifted.

This shift in the presumption about how civil litigation resolves is starkly reflected in how federal civil rulemaking has changed between 1938 and today. The original rulemakers had a distinct vision of how litigation would progress.<sup>194</sup> That vision presumed that trial was the ultimate goal of the civil litigation system. Today, that vision is very different; resolution of cases is the goal, but trial is certainly not the chosen method.

When the Rules Enabling Act was adopted in 1934, the U.S. Supreme Court appointed a body of academics and practitioners as an Advisory Committee to draft a body of federal procedural rules.<sup>195</sup> That body worked together for four years and, in 1938, produced the Federal Rules of Civil Procedure. They did not do this work on a clean slate, however. Many of the rulemakers had distinct viewpoints about how civil litigation would best function based on their own experience and study.<sup>196</sup>

For example, an academic member of the Committee argued for a discovery system that would allow the parties to freely exchange information.<sup>197</sup> This exchange was intended to allow the parties to more easily resolve their claims and to focus the parties on what merits issues needed to be resolved. The original Rule 26 allowed for the discovery of all relevant information related to the subject matter of the litigation. The Advisory Committee note to the original Rule 26 stated, “While the old chancery practice limited discovery to facts supporting the case of the party seeking

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<sup>194</sup> At least the academic members of the Committee had this vision. *Id.* It is difficult to know how the attorneys on the Committee viewed the system, as they did not leave as abundant of a record of their viewpoints behind.

<sup>195</sup> Bone, *supra* note 64, at 894 (discussing the early history of Federal Rules).

<sup>196</sup> For example, Charles Clark, the noted “father of civil procedure,” believed that both the writ system and code pleading had failed. *See* Clark, *supra* note 63, at 43–68. These systems, he thought, focused too much on technical requirements of moving a case through the system and not enough on resolving the merits. *See id.* at 50–51. Thus, Clark advocated for a pleading regime that did not require the technical pleading of ultimate or evidentiary facts. *See id.* at 52–53. The Committee chose instead to adopt the current Rule 8, which on its face requires the plaintiff to state only a claim showing that he or she is entitled to relief. FED. R. CIV. P. 8(a)(2) (requiring a plaintiff to provide “a short and plain statement of the claim showing that the pleader is entitled to relief”). This “notice” pleading regime was intended to focus the case on its merits and to propel cases more efficiently toward resolution.

<sup>197</sup> *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 710 (1998); Edson R. Sunderland, *The Theory and Practice of Pretrial Procedure*, 36 MICH. L. REV. 215, 216–19 (1937).

it, this limitation has been largely abandoned by modern legislation.<sup>198</sup> Thus, the Committee rejected limitations on discovery and drafted a broad rule that would allow each party to obtain the information they needed to go to trial.<sup>199</sup> Access to discovery was limited only by objections of attorney-client privilege and relevance.<sup>200</sup>

Finally, although the original Rules provided that claims could be eliminated by judicial intervention pre-trial, those opportunities were limited. Namely, the Rules provided for a pre-trial motion to dismiss and a motion for summary judgment. Yet it cannot be overstated that the original Committee viewed these motions as ones meant to capture truly frivolous claims.<sup>201</sup> If a claim potentially had merit, the Committee envisioned that claim making it to trial.<sup>202</sup>

In terms of the default endgame, the rulemakers were certainly bullish about the opportunity for trial. Thus, they designed a procedural system that facilitated that end to the degree possible. The rulemakers did not believe that all cases would reach trial, however. As already discussed, even the highest of trial statistics from that era shows that, at most, twenty percent of cases were going to trial. The rulemakers' goal was not to have a trial in every case, yet it is probably safe to say that the goal was to create the option for a trial—where merited—in every situation. That presumption was behind the design of the original rules.

<sup>198</sup> FED. R. CIV. P. 26(b)(1) advisory committee's note to 1937 adoption.

<sup>199</sup> Similarly, in 1946, Rule 26(b)(1) was amended to clarify that parties could seek inadmissible evidence through discovery. The Advisory Committee note explained, "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." FED. R. CIV. P. 26(b)(1) advisory committee's note to 1946 amendment.

<sup>200</sup> Work product protection, or trial preparation material protection, was codified in 1970. FED. R. CIV. P. 26(b)(3) advisory committee's note to 1970 amendment. This codification followed the U.S. Supreme Court's decision in *Hickman v. Taylor* in 1947, where the Court ostensibly created that protection. See 329 U.S. 425, 511 (1947).

<sup>201</sup> Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998). Patricia Wald explains that,

As originally envisioned by its drafters in 1937, the purpose of Rule 56 was to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer. . . . "[Through summary judgment,] dilatory tactics resulting from the assertion of unfounded claims or the interposition of specious denials or sham defenses can be defeated, parties may be accorded expeditious justice, and some of the pressure on court dockets may be alleviated."

*Id.* (footnote omitted) (quoting 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2712, at 563 (2d ed. 1983)).

<sup>202</sup> See *id.* For a discussion of the difference between frivolous and meritless claims, see Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1191 (2014).

Over time, however, that presumption has shifted. Starting in the 1970s, the rulemakers began to worry about efficiency and consequently began shifting away from the trial presumption. As discussed in Part I, this is also the time that a greater number of federal rights came into being and civil filing rates increased.<sup>203</sup> Moreover, the public began to view litigation more skeptically, believing that much of what was occurring was frivolous.<sup>204</sup> For example, this led the Committee to adopt Rule 11 in 1983, a rule that provided for mandatory sanctions if a claim was filed frivolously.<sup>205</sup> Beyond sanctions, however, the Committee's work with respect to the discovery rules aptly displays this shift.

In 1983, the Committee amended Rule 26(b)(1) to add factors meant to aid judges in dealing with what it called "over-discovery."<sup>206</sup> The Committee further explained that the "new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery over-use."<sup>207</sup> The note is silent as to the impact the additional language would have on a party's ability to prepare for trial, but it stated that "the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case."<sup>208</sup> This statement could be read as providing judges with the option to allow discovery to move forward in certain cases, even when it might be burdensome, in order to allow a case to move forward toward the merits.

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<sup>203</sup> See *supra* notes 22–59 and accompanying text.

<sup>204</sup> See *supra* notes 22–59 and accompanying text.

<sup>205</sup> See Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 100–01 (1993) (discussing the evolution of Rule 11). Rule 11 was amended again in 1993 because of criticism that it created increased "satellite litigation" and had a chilling effect on plaintiffs filing novel claims. See Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 172–75 (1994) (stating that the 1983 alteration of Rule 11 was in response to concerns that judges were inconsistently imposing sanctions against "civil rights plaintiffs more often than any other category of civil litigants"). The 1983 Rule was causing "satellite litigation over, for example, its terminology and the kind and size of sanctions levied." *Id.* at 172. There were also concerns that the 1983 Rule was "discourag[ing] plaintiffs from pursuing novel legal theories," and "its application could be disadvantaging resource-poor litigants." *Id.* at 174–75.

<sup>206</sup> FED. R. CIV. P. 26 advisory committee's note to 1983 amendment, subdivision (b): Discovery Scope and Limitations.

<sup>207</sup> *Id.* The note also stated that:

The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. . . . The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). On the whole, however, district judges have been reluctant to limit the use of the discovery devices.

*Id.* (citations omitted).

<sup>208</sup> *Id.*

That potential for concern about the merits, however, was nowhere to be found by the year 2000.<sup>209</sup> The Committee once again amended the discovery rules, this time to limit the scope of discovery to information relevant to the claims or defenses being made.<sup>210</sup> The revised rule allowed a judge to expand discovery beyond claims and defenses to subject matter upon a showing of good cause.<sup>211</sup> The Committee note explained that “[c]oncerns about costs and delay of discovery have persisted” in spite of previous revisions to the discovery provisions.<sup>212</sup> Unlike the changes in 1983, the Committee made no reference to the potential impact the rule would have on parties attempting to resolve the merits of their cases.

The shift in presumptions about the purpose of discovery vis-à-vis trial is equally apparent in the Civil Rules Committee’s most recent proposals. Following the Duke Conference on Civil Litigation in 2010, the Civil Rules Committee focused on further revising the discovery rules.<sup>213</sup> The original package of proposals was sweeping. It lowered the presumptive limits on depositions, interrogatories, and requests for admission. It also eliminated the requesting party’s ability to expand its inquiry beyond its claims or defenses and into the subject matter of the litigation—a feature that was already only granted when the requesting party could show good cause.<sup>214</sup> And, of course, the most controversial part of the discovery amendments introduced proportionality into Rule 26(b)(1).<sup>215</sup>

Critics of the recent proposals argue that the specific revisions to Rule 26(b)(1) provide producing parties with an additional tool to obstruct production of information.<sup>216</sup> The argument is that defendants will now routinely object to discovery requests on the basis of proportionality.<sup>217</sup> A related fear is that courts will engage in more cost-shifting, forcing plaintiffs to pay for the discovery they are requesting. Critics are concerned that resource-strapped plaintiffs will now be deterred from bringing claims for fear of the discovery costs, and further, that even when plaintiffs bring their claims, defendants will use these rules to delay and out-spend the plaintiff.<sup>218</sup>

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<sup>209</sup> In 1993, the Committee amended the discovery rules to add new 26(a), which provides for mandatory initial disclosures. FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment. This amendment also resulted in the splitting of the factors adopted in 1983 from Rule 26(b)(1) into Rule 26(b)(2). See FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment.

<sup>210</sup> FED. R. CIV. P. 26(b)(1).

<sup>211</sup> *Id.*

<sup>212</sup> FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1993 amendment, subdivision (b)(1).

<sup>213</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 79–80.

<sup>214</sup> *Id.*

<sup>215</sup> See *supra* notes 60–109 and accompanying text.

<sup>216</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 81 (noting the divide among plaintiff and defense attorneys regarding the proportionality proposal).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

Proponents of these proposals argue that the new rule simply moves much of the proportionality analysis that already existed in the rule from Rule 26(b)(2)(C) to Rule 26(b)(1).<sup>219</sup> The purpose of moving this language is not to change discovery burdens, the argument goes; the move is meant to remind parties and courts of their duty to keep the discovery proportional and to be attentive to cost.<sup>220</sup> The parties in favor of this rule change argue that discovery costs are so high for many defendants that they settle—not because they think they are wrong on the merits, but because the cost of litigation is too high to risk an unpredictable trial.<sup>221</sup>

Regardless of whether one agrees with the proposition that discovery needs to be proportional to the value of the case, the arc of this particular rule change bends in the direction of not reaching trial. The Advisory Committee note language is telling. The earlier reference to garnering material “which may aid a party in the preparation or presentation of his case” is gone.<sup>222</sup> The note for the current proposal explains that “the information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.”<sup>223</sup> The Committee and its work are no longer focused on discovery as a mechanism for a full exchange of information that can then lead to a determination of the merits. Instead, it is focused on lowering the cost of discovery, without any express or even implied reflection on how restrictions on discovery might affect the ability of parties to get to trial.<sup>224</sup> Again, the efficiency norm is not solely responsible for this attitudinal shift, but it is certainly a critical part of the story.

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<sup>219</sup> *Id.* at 83–84.

<sup>220</sup> *Id.* at 84. The Duke Subcommittee stated, “If the expressions of concern reflect widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation.” *Id.*

<sup>221</sup> *Id.* at 83.

<sup>222</sup> See FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1946 amendment; see also *supra* note 199 (quoting language).

<sup>223</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 102 (quoting FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1993 amendment).

<sup>224</sup> The Committee is not the only institution that has made this shift. Courts have done so as well, for example, in the context of rules governing pleading. In 1944 in *Dioguardi v. Durning*, then-Second Circuit Judge Charles Clark took advantage of the opportunity to clarify what was intended by the notice pleading regime ushered in by Rule 8. See 139 F.2d 774, 775 (2d Cir. 1944). In reversing a district court’s dismissal of the complaint, Judge Clark wrote that “however inartistically . . . stated,” the plaintiff had met the requirements of Rule 8 by stating his claim. *Id.* Further, Judge Clark wrote that based on the complaint, he could not “see how the plaintiff may properly be deprived of his day in court” to prove his case. *Id.* The U.S. Supreme Court had the opportunity to weigh in on pleading thirteen years later in 1957 in *Conley v. Gibson*. See 355 U.S. 41, 47–48 (1957). The Court reversed lower courts’ decisions to dismiss the complaint, noting that the “Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of the pleading is to facilitate a proper decision on the merits.” *Id.* at 48. Further, the Court explained that notice



## 2. From Plaintiff Receptivity to Skepticism

This section examines how the current efficiency norm has also contributed to a shift from plaintiff receptivity to plaintiff skepticism. Although the civil litigation system used to provide room for the plaintiff to develop its case, it now views each of the plaintiff's steps with skepticism.

### *a. The Civil Rules: From Trust to Doubt*

Another presumption that has shifted in civil litigation is how plaintiffs are perceived by the system. Court did not blindly defer to plaintiffs in the early years of the modern civil litigation regime. Plaintiffs certainly had burdens to carry in order to make their way through the system. Yet the treatment was still fairly generous.<sup>225</sup> Plaintiffs were treated with receptivity. Once plaintiffs met their threshold requirements, they moved to the next stage of litigation. That presumption has shifted, however, to a hearty skepticism of plaintiff requests.

In the rulemaking context, the current discovery amendments demonstrate this shift. As discussed in Part III section B, the original rulemakers set up a system that would essentially require the production of information to parties as long as the information was relevant and not subject to privilege.<sup>226</sup> The current attitudes are quite different. For example, the proposed amendment to Rule 26(b)(1) would eliminate the ability of plaintiffs to request information related to the subject matter of their litigation, even if not related to the parties' claims, as long as they can show good cause. Plaintiffs will be limited to obtaining information related to their claims.<sup>227</sup> This may

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pleading worked because of "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47–48. In other words, like the early language of the Committee's notes to the discovery rules and Judge Clark in *Dioguardi*, the *Conley* Court articulated a merits-based trial presumption when it interpreted Rule 8. This presumption of trial has shifted as demonstrated in the two most recent Court opinions on pleading. *See Iqbal*, 556 U.S. at 677–78; *Twombly*, 550 U.S. at 555–57. In both of those cases, the focus shifted from a merits-based resolution for the plaintiff to a concern about how discovery costs might force a defendant to settle a frivolous claim. *See Iqbal*, 556 U.S. at 685–86 (stating that "[I]itigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources," requiring the Court to move its focus from to possibility of discovery for plaintiffs to the "burdens of discovery" for the defendants); *Twombly*, 550 U.S. at 559 (explaining that Rule 8 required a stricter reading because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" proceedings like summary judgment). Thus, like the Committee, the Court has shifted its norms about the endgame of civil litigation from a trial on the merits to an exit that is distanced from the merits and predominantly about the exit itself.

<sup>225</sup> Plaintiffs had to meet the notice pleading requirements of Rule 8, for example.

<sup>226</sup> *See supra* notes 197–200 and accompanying text (discussing the original approach to discovery under Federal Rules).

<sup>227</sup> 2014 ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 69, at 79–81.

not seem like a critical change, but it is demonstrative of the shifting presumptions about plaintiffs' claims that tend to guide rulemaking today. The idea is to limit—within the rules—the plaintiff's ability to receive whatever litigation result the plaintiff seeks.

Other rules are demonstrative of this skepticism as well. In the 1960s the rulemakers created the class action rule. If there were a poster child rule for plaintiff receptivity, the class action rule would be it. The rule was groundbreaking in its allowance of the innovation of class action joinder, especially Rule 23(b)(3) class actions.<sup>228</sup> The rule was and remains controversial, but the adoption of the rule is critical for this point, because it represents the rulemakers' attitudes about plaintiff claims.<sup>229</sup> Rule 23 sits in stark contrast to Rule 11, which was adopted almost two decades later. Rule 11 ushered in a regime of sanctions for parties and their attorneys who were thought to be filing excessive and costly frivolous claims.<sup>230</sup> The courts' presumption shifted from one of receptivity to the potential for a meritorious claim to suspicion that more claims are now frivolous. Indeed, the presumptive shift that led to the adoption of Rule 11 may linger behind the Civil Rules Committee's current plans to amend Federal Rule of Civil Procedure Rule 23.<sup>231</sup> Whether the proposal will be guided by a presumption of plaintiff skepticism remains to be seen.<sup>232</sup> Regardless, the overall trend in federal civil rulemaking is to change rules with a skeptical eye toward the validity of plaintiffs' claims.

### *b. Courts and Congress: Expansion, Contraction, and Discretion*

Beyond rulemaking, courts have become complicit in this shift. First, they have become complicit because of the great amount of discretion now

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<sup>228</sup> Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 363 (“But the great modern innovation in class actions is the dramatic expansion of the efficiency-based use of aggregation under Rule 23(b)(3).”).

<sup>229</sup> It also, importantly, represents a different conception of efficiency. Most certainly the rulemakers thought this change would be more efficient for litigation. For a discussion of how efficiency is subject to multiple definitions and should not be limited to the current dominant one, see *supra* notes 112–231 and accompanying text and *infra* notes 233–272 and accompanying text.

<sup>230</sup> See Kobayashi & Parker, *supra* note 205, at 100–01 (highlighting the adverse results of 1983 amendment to Rule 11).

<sup>231</sup> U.S. COURTS, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE—OCTOBER 2014, at 499–552 (2014), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-october-2014> [<http://perma.cc/G8RH-B9RB>] (enclosing Rule 23 Subcommittee Report).

<sup>232</sup> Interestingly, the first subject is class settlement. The Subcommittee report states: “The reality is that few certified class actions are tried, and most are settled. The reality may well also be that more cases are certified for settlement only than for litigation.” *Id.* at 500. This is demonstrative of the previous presumption about civil litigation's endgame, discussed *supra* notes 60–109 and accompanying text.

provided to them in the rules. Over the years, the Civil Rules have refrained from providing mandatory provisions and have instead given judges guiding principles and discretion. This trend is apparent in the changes to Rule 37<sup>233</sup> and Rule 56.<sup>234</sup> As already discussed, judicial attitudes regarding litigation have shifted such that greater discretion in the Rules will tend to result in greater skepticism of plaintiff requests.

Courts also demonstrate this shift through their decisions in pre-trial dispositions. Summary judgment is the paradigmatic example of this. In the early years, judges treated summary judgment (and not plaintiff requests) with great skepticism. In fact, then-Judge Charles Clark defended the summary judgment rule from judicial skepticism. In 1946 in *Arnstein v. Porter*,<sup>235</sup> the Second Circuit majority reversed a district court's grant of summary judgment, noting, "We agree that Rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them."<sup>236</sup> This skepticism was due, according to the court, because the process might devolve into a "trial by affidavits . . . which, so the historians tell us, began to be outmoded at common law in the 16th century, [and] would, if now revived, often favor unduly the party with the more ingenious and better paid lawyer."<sup>237</sup> The court feared that if that application of summary judgment were permitted,

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<sup>233</sup> In the 2006 e-discovery amendments, Rule 37(f) was amended to provide that the judge could not impose sanctions if electronically stored information was "lost as a result of the routine, good-faith operation of an electronic information system," unless the judge found "exceptional circumstances." FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment, subdivision (f). This provision left the judge with the discretion to impose sanctions if those circumstances were found. See U.S. COURTS, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE—MAY 2005, at 83–85 (2005), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf> [<http://perma.cc/ZBJ4-SF7X>].

<sup>234</sup> In 2007, Rule 56 was amended as part of the rules-wide restyling project. For a detailed account of these events, see generally Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1139–42 (2010). As part of the restyling, the word "shall" was eliminated as much as possible from the Federal Rules and replaced with "must" or "should." Rule 56 originally stated that summary judgment "shall" be granted when "there is no genuine issue of material fact." With the restyling, that term was changed to "should." *Id.* at 1139–40. Although the restyling was not intended to make any substantive change to the rules, some thought it had. This belief was compounded when the Committee, in a later Rule 56 amendment, asked for commentary as to whether the proper word guiding judges should be "must." In other words, should the judge be required to grant summary judgment when there is no genuine issue of material fact or should the judge have discretion? Ultimately, after an embattled discussion, the Committee opted to keep the original "shall" wording. This left judges with the same limited amount of discretion they possessed before the rules were restyled, according to jurisdictional differences. *Id.* at 1142.

<sup>235</sup> 154 F.2d 464, 468 (2d Cir. 1946).

<sup>236</sup> *Id.* at 470 n.16. The court further noted, "We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit a 'trial by affidavits,' if either party objects." *Id.* at 471.

<sup>237</sup> *Arnstein*, 154 F.2d. at 471.

“[g]rave injustice might easily result.”<sup>238</sup> In response, Judge Clark contended that the courts’ misapplication of the rule was “ad hoc legislation,” which was “dangerous in the [present] case” and “disturbing to the general procedure.”<sup>239</sup> This debate represents the initial difficulty that courts had in using summary judgment because of receptivity to a plaintiffs’ requests to proceed with trial.

Court skepticism of summary judgment reversed starting with the 1986 trilogy of summary judgment cases.<sup>240</sup> With those cases, summary judgment started to become more commonplace. Now, many scholars argue that we have an over-zealous application of summary judgment, especially in the context of particular substantive claims like employment discrimination.<sup>241</sup> Part and parcel of this acceptance of summary judgment is the skepticism with which plaintiffs’ claims are viewed. This makes judges much more likely to give summary judgment a more capacious reach and results in higher grant rates. This result is indicative of a system that is now quite skeptical of plaintiffs’ claims.<sup>242</sup>

Finally, Congress has played a part in propagating the shift from plaintiff receptivity to skepticism. As discussed in Part II section A,<sup>243</sup> the thrust of the Rules Enabling Act was to allow plaintiffs to gain access to federal

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 479.

<sup>240</sup> In that year, the Supreme Court decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Following those decisions, courts became more receptive to summary judgment. Indeed, Justice William Rehnquist asserted in *Celotex*, “Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to ‘secure the just, speedy and inexpensive determination of every action.’” 477 U.S. at 327 (quoting FED. R. CIV. P. 1). Nonetheless, some courts have maintained their skepticism. See Bennett, *supra* note 160, at 716–17 (concluding summary judgment is greatly overused and Rule 56 should be significantly amended, if not eliminated); Susan Taylor Wall, “No Spittin’, No Cussin’ and No Summary Judgment:” *Rethinking Motion Practice*, 8 S.C. LAW. 29, 29 (1997) (discussing judicial skepticism of summary judgment and likening it to a sign in an Alabama state court reflecting this sentiment).

<sup>241</sup> See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 764, 766–67 (2007) (questioning the robust use of summary judgment in the employment discrimination context and asking: “[W]hat if the judge does not realize the differences between those views—his or her perspective and those of a ‘reasonable juror’? What if a judge does not have the humility, self-awareness, or insight to recognize the limitations of his or her own perspective?”); Wald, *supra* note 201, at 1918–30, 1943 (surveying summary judgment cases in the D.C. Circuit and determining that “facts are oversimplified and reduced to a minimum in order to comply with the requirements of summary judgment procedure, and as a result there is less information available to future disputants and judges”).

<sup>242</sup> The move from notice to plausibility pleading under *Twombly* and *Iqbal* similarly demonstrates this shift. See *supra* notes 78–81 and accompanying text (discussing the Supreme Court’s more defendant-friendly decisions in *Twombly* and *Iqbal*).

<sup>243</sup> See *supra* notes 60–109 and accompanying text (outlining the early history of Federal Rules).

court in order to adjudicate their claims. The purpose was to move away from technical requirements that might keep unwitting plaintiffs from seeing their claims through.<sup>244</sup> Further, as discussed in Part I, during the 1960s and 1970s, Congress created additional substantive rights for individual plaintiffs.<sup>245</sup> In some sense, that legislative agenda reflected the kind of receptivity that this Article describes.

Recent legislation has changed that tide. As discussed, rulemakers have become more skeptical of plaintiffs' claims. Similarly, Congress has ostensibly moved away from right-creation, and in the procedural realm, it has actively limited how plaintiffs can bring their claims into federal court. Examples abound. The Private Securities Litigation Reform Act limits a litigant's ability to get to discovery until they overcome hurdles regarding the validity of their claims.<sup>246</sup> The Class Action Fairness Act of 2005 ("CAFA") is another example; that statute effectively funneled class actions that were filed in state courts into the federal system.<sup>247</sup> Congress passed CAFA because it concluded that states were allowing frivolous and inefficient class actions to proceed.<sup>248</sup> The Prison Litigation Reform Act was passed for similar reasons—prisoners were supposedly filing wasteful frivolous cases.<sup>249</sup> The commonality of this legislation is a presumed skepticism of certain kinds of plaintiffs' claims, a skepticism that did not historically appear in legislation governing procedural doctrine.

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<sup>244</sup> See Coleman, *supra* note 146, at 264–65 (arguing that the structure of the federal rulemaking bodies benefits better-resourced parties in litigation and marginalizes less-resourced parties and their lawyers).

<sup>245</sup> See *supra* notes 60–109 and accompanying text (noting an increased federal caseload due to new federal legislation providing individuals with substantive rights that could be enforced through civil litigation).

<sup>246</sup> See *supra* notes 128–129 and accompanying text.

<sup>247</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2012)).

<sup>248</sup> Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 115 (2006) (stating that CAFA is "Congress' latest attempt to curb abusive class action practices occurring in state courts," such as "meritless class action litigation . . . [n]uisance filings, vexatious discovery requests, and 'manipulation by class action lawyers of the client whom they purportedly represent'" (quoting H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.))); Jeffrey L. Roether, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2745 (2007) (reporting that Congress passed CAFA in response to "abuses of the class action device by aggressive lawyers and lenient state judges [which] have 'undermine[d] the national judicial system'" (quoting Class Action Fairness Act of 2005 § 2(a)(4))).

<sup>249</sup> See *supra* notes 130–132 and accompanying text (discussing Senator Dole's statements regarding the intent of the PLRA).

#### IV. TOWARD RECLAIMING THE EFFICIENCY NORM

As demonstrated, the current efficiency norm is flawed. First, institutional actors' version of efficiency is problematic because it leads them to focus solely on making each litigation moment cheaper. It undervalues (or does not value at all) costs that are more difficult to measure and thus does not accurately reflect what is efficient. Second, the presumptions underlying the civil litigation system have markedly shifted, and the efficiency norm is partly responsible for such shifts. This Part argues that the existing efficiency norm and its attendant shifting presumptions have distorted the civil litigation system. It then argues in for a reclaimed definition of efficiency and proposes specific ways to implement and fortify that revised efficiency norm.

##### *A. Civil Litigation Distorted*

As a consequence of the current efficiency norm, the presumptions underlying civil litigation have shifted. If these shifting presumptions create positive results for the civil litigation system, then perhaps the shifts are justified, even if the efficiency definition is problematic. These shifts have not created a positive result for the civil litigation system, however. First, as these presumptions have shifted, non-public adjudication has become commonplace. This decrease in public adjudication has threatened to eliminate a key element of our democratic society, and it has, in some cases, stifled the development of and consensus around the rule of law.<sup>250</sup> Moreover, as these presumptions have shifted, the barriers to entry into the civil litigation system have risen. This has had a disproportionate effect on the most marginalized litigants.

The United States courthouse used to be “a symbol of the community, of equality, and of justice.”<sup>251</sup> The idea that the democratic enterprise was well-served by a robust public court system is fading as the civil justice system becomes less public and more private.<sup>252</sup> As scholars have argued, “If one believes in the underlying values of American democracy, [the loss of

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<sup>250</sup> Moohr, *supra* note 133, at 426–27 (arguing that public judicial adjudication, among other things, “educates the public, creates precedent, develops uniform law, and forms public values”).

<sup>251</sup> Elizabeth Thornburg, *Reaping What We Sow: Anti-Litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts*, 30 CIV. JUST. Q. 1, 1 (2011).

<sup>252</sup> Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 98 (suggesting that by reducing the court's role, and thus a public forum's role, in resolving disputes, “we run the risk of finding ourselves without an institution that has the political legitimacy to make fact- and law-based decisions when we need them”); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 317–18 (2004) (arguing that democratic values are threatened by private adjudication methods like mandatory arbitration); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1675 (2005).

the public trial is] deeply troubling . . . .”<sup>253</sup> This privatization is not just a consequence of alternative dispute resolution; it is also due to a decrease in trials and an increase in pre-trial disposition.

This privatization of the litigation system has other consequences as well. The chance for law to develop—and for the community to engage in that development—is far lower.<sup>254</sup> This means that legal precedent will be underdeveloped. It also means that in areas where the public has a distinct interest in how the law develops—such as anti-discrimination law—the public will not have a chance to engage and learn from the court’s resolution of claims. That resolution, if any, will be framed by a subset of the population, one that may not best reflect society’s values.<sup>255</sup> Moreover, without the threat of litigation in the public eye, the deterrence value of litigation is largely lost.<sup>256</sup> Finally, there are other intangible benefits to a public court system such as “training for lawyers and judges, discovery and disclosure of facts relevant to public health or government integrity and the general support of peace and order.”<sup>257</sup> As the civil litigation presumptions shift in the name of efficiency and other normative concerns, these advantages are lost.

In addition to the loss of the advantages described above, the shifting civil litigation presumptions have also resulted in higher (and sometimes insurmountable) barriers to marginalized individuals. Changes made under the guise of efficiency—ones that are done in order to address the most complex and less frequent cases—have a consequence. The consequence is that plaintiffs with fewer resources are unable to overcome the barriers to justice that have been erected. This arguably means that certain kinds of

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<sup>253</sup> Burbank & Subrin, *supra* note 9, at 401.

<sup>254</sup> See Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 703–11 (2004) (arguing that private adjudication, like mandatory arbitration, decreases public knowledge and precedent); Thornburg, *supra* note 251, at 81 (arguing that public litigation, as opposed to private adjudication, produces reasoned decisions and precedent that others can benefit from).

<sup>255</sup> Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America’s Social Capital*, 2006 J. DISP. RESOL. 165, 165. As one scholar explained:

[T]he diminishing opportunity for Americans to convene publicly and formally in a trial setting nevertheless has disturbing implications for communitarians, which we ought not ignore. In particular, we should be concerned about developments that remove law and legal institutions from broad participation by the citizenry and concentrate them in the hands of an educated elite.

*Id.*

<sup>256</sup> William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 235–40, 261 (1979) (using law and economics to argue that public adjudication creates a public good because it creates and enforces rules of law, deterring aberrations).

<sup>257</sup> Thornburg, *supra* note 251, at 81.

claims are lost. Some of these claims, like discrimination claims, necessarily enforce social norms, meaning that their loss leaves those norms under-enforced. Other claims, like product-liability claims, enforce regulations that resource-strapped agencies may not be able to cover.<sup>258</sup> This is not to say that all of these claims are meritorious ones or that some of these claims are not properly filtered out of the civil litigation system. Rather, the argument is that the presumptions underlying civil litigation have shifted so far that they have potentially eliminated the opportunity for these kinds of claims to make it through the federal civil litigation system. That loss is traceable, at least in part, to the increased fidelity to the current efficiency norm, and it demonstrates that these shifts are not so beneficial.

### B. Toward Reclaiming and Redefining Efficiency

Efficiency must be reclaimed and redefined. It is not just that the balance between efficiency and justice needs to be restored.<sup>259</sup> That might very well be true. But before deciding where to strike that balance, we must first have a valid definition of efficiency itself. Because the current efficiency norm is a pandemic, affecting all areas of procedural doctrine at all institutional levels, we need to work toward consensus regarding what efficiency means.

Most critically, a reclaimed definition of efficiency has to reflect the fact that “efficient” does not equal “cheap.” In other words, making changes to the Civil Rules and doctrines in order to simply make litigation cheaper—as a matter of a litigant’s financial bottom line—is not acceptable. This view of efficiency is over-simplified and, as demonstrated in this Article, has contributed to paradigmatic shifts in how our civil litigation system functions.<sup>260</sup>

Instead of focusing only on the monetary costs associated with civil litigation, a new definition of efficiency must include other costs. For exam-

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<sup>258</sup> See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 83 (2000).

<sup>259</sup> See Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 280 (1991) (arguing that “an examination of the treatment of the court’s efficiency in recent complex-litigation developments reveals inattention to the benefits of litigation and overemphasis of the costs”); Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 393 (1990). As one scholar stated:

When recent procedural reforms are subjected to an efficiency analysis, a mode of analysis criticized for failing to consider a wide range of relevant values, the reforms seem sensible if not salutary. When subjected to traditional multivalue analysis, the appropriateness and desirability of the reforms are called sharply into question.

Yamamoto, *supra*, at 393.

<sup>260</sup> See *supra* notes 110–249 and accompanying text.



ple, if litigation filters out meritorious cases at too great of a rate, or if it chills the filing of such cases in the first place, the system loses the potential benefit of that claim. That claim has value in terms of deterring other potential defendants from engaging in potentially unlawful behavior.<sup>261</sup> The claim also has value because it might result in a clear statement of the law, providing precedent for others to follow and understand.<sup>262</sup> Of course, not all litigation produces these benefits.<sup>263</sup> But for the litigation that does, not valuing the cost of the loss of that litigation means that efficiency is not accurately defined.

Moreover, even when a plaintiff loses, seeing the claim through the litigation process provides a benefit to the system in terms of the individual's ability to abide by the result and the public's perception of the system's legitimacy.<sup>264</sup> These costs might be difficult to value, but any definition of efficiency should still account for them. For example, the accuracy of the adjudication of claims might cause a benefit of shifting back towards traditional civil litigation presumptions. Although this could create costs in terms of time spent by the judge or dollars spent by the parties, those costs have to be balanced against the benefit that accuracy brings.<sup>265</sup> Again, accuracy is difficult to measure, but the concept should be included in any estimation of whether a change to procedural doctrine is truly efficient for the system.<sup>266</sup> Moreover, as one scholar has argued, any litigation system has to tolerate some amount of inaccuracy lest the system be too burdened to ever

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<sup>261</sup> Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. (forthcoming) (manuscript at 6), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2551520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520) [<http://perma.cc/GPL6-86AF>] ("A tort victim seeking money damages does not collect all the social benefits that accrue to society from the effect a judgment will have on either the deterrence of incentives to take care, the benefits of precedent, or other social benefits that would be generated through litigation."); *id.* (manuscript at 10–11) (using a numerical example to demonstrate how much proportional discovery might actually "cost" if we account for the "aggregate social value of extensive discovery" and not just the "private value to a plaintiff in a litigation process that has already commenced").

<sup>262</sup> *Id.* (manuscript at 6).

<sup>263</sup> *Id.* ("On the other hand, the private benefits from using the litigation system may also exceed the social benefits [like deterrence].").

<sup>264</sup> Yamamoto, *supra* note 259, at 387 ("Litigation process is legitimized by procedures that ensure the effectuation of individual rights, that recognize the significance of dignity and individual participation in the peaceful resolution of disputes, and that foster a sense of fairness on the part of litigants and the public.").

<sup>265</sup> Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740 (1987) ("A tardy judgment is worth less than a swift one if it is correct, but an erroneous judgment has no value at all, or, more likely, negative value. Hence the efficiency of a system of adjudication is severely undermined to the extent that it produces avoidable errors.").

<sup>266</sup> *Id.* (arguing that "while the cost and duration of a legal proceeding are (at least in principle) directly observable, its accuracy is almost always unknown since we rarely have any external evidence by which to judge it").

reach a result.<sup>267</sup> Procedure, however, provides legitimacy to such outcomes.<sup>268</sup> Thus, the cost of an inaccurate result must be measured, and any attempt to offset that cost, whatever it may be, relies on the legitimacy of the procedures that get the parties there. Stated differently, there is a cost to unjust procedures—that being the legitimacy that inures to a system that will inevitably reach inaccurate results. That cost must be valued when determining the efficiency of any particular procedural change.

So, what does this mean for how the efficiency norm should be re-defined? In the simplest terms, it means that efficiency—as applied to civil litigation—must take account of all of the potential costs and benefits. That calculus must attempt to quantify costs and benefits that are difficult to quantify, or if it is impossible to measure, then it must find some other way to include them in the equation.

To be sure, no definition of efficiency is going to perfectly capture the costs and benefits of each case filed or each rule made. One need only look to administrative law to see that this exercise is fraught. One scholar recently observed that he has refrained from arguing that Civil Rule amendment proposals should be subjected to formal cost-benefit analyses like what is done in the administrative law context because “such analysis [in that context] . . . has proved to be difficult and inconsistent, because the rulemakers lack the information and qualifications to conduct it, and because, even if they did not, such a requirement would be the source of substantial delay in a process that is already lengthy.”<sup>269</sup> This much is probably true, but the recent discovery rules push the definition of efficiency onto the judges, and there is a danger that some of the other costs discussed herein (referred to as “social benefits”) will receive “short shrift.”<sup>270</sup> In other words, efficiency is being defined by institutional actors, whether we like it or not; yet, this persistent conception of efficiency is deeply flawed. Thus, a move in the direction of attempting to better define the word, no matter how imperfect, is a step in the right direction.

### *C. Explicit Defaults in Rules and Decisionmaking*

As the discussion above demonstrates, it is difficult to arrive at a definition of efficiency that meets the needs of all subject areas and institutional

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<sup>267</sup> Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190, 247 (2004).

<sup>268</sup> *Id.* at 190 (“[O]nly just procedures can confer legitimate authority on incorrect outcomes.”).

<sup>269</sup> Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. (forthcoming) (manuscript at 8–9) (footnotes omitted), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2553288](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553288) [http://perma.cc/A6UH-GUR7].

<sup>270</sup> *Id.*

actors. Nonetheless, the exercise is not completely futile. There is more work to be done in confronting the efficiency norm.

For example, scholars and practitioners should encourage institutions like the Civil Rules Committee to articulate a common vision of efficiency. This kind of exercise would be useful for rulemakers in making the rules, for judges in construing them, and for parties in utilizing them. Congress should similarly engage with this question. Or perhaps this is a task for the American Bar Association or for some other organized group of lawyers. The point is that if positive steps are not taken to define efficiency, the void will be filled with the present efficiency norm, and it will continue to impact the civil litigation presumptions discussed above.<sup>271</sup>

Further, rulemakers could embed evaluative judgments about efficiency into particular rules. For example, in summary judgment, one could imagine a part of the rule that encourages (or requires) judges to deny a motion for summary judgment where it is a close call as to whether there is a genuine dispute of material fact. This rule change would accompany a determination that efficiency—as newly defined—requires less summary judgment and more trials.<sup>272</sup> There are perhaps other places where these kinds of explicit presumptions, which act as a guarantor of a newly defined efficiency, could be inserted into the rules. They could be placed in the discovery or sanction rules, for example. The idea is that once we have arrived at a common definition of efficiency, there will be ways to bolster that definition.

## CONCLUSION

The word efficiency has been misused by institutional actors in the civil litigation system. Under the shield of the current efficiency norm, civil

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<sup>271</sup> See Miller, *supra* note 11, at 1134. This is consistent with Arthur Miller's view that:

[I]nvocations of complexity or uniformity exceptions or assumptions as to efficiency and policy preferences, let alone resort to the "litigation explosion" and "liability crisis" bromides, as rationales for limiting access to trial and jury adjudication must be cabined, and the district courts must provide, and appellate courts must demand, better reasoning.

*Id.*

<sup>272</sup> For example, Suja A. Thomas has argued there is a cost associated with the loss of a jury trial—a cost that is not quantified when assessing the benefits of, for example, screening out frivolous cases. Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 647 (2010) ("[C]ost is trumping the Constitution. . . . If cost is to be taken into account in the decision of whether a procedure is to be used, the decision should explicitly discuss cost in the analysis of the procedure's constitutionality, and the use of cost should be justified."). Of course, if a defendant chooses to settle because it believes that trial is too great of a risk, there is a cost. And, there is a cost if that settlement is not merited, but done because of a legitimate fear of the inaccuracy of a jury trial. In other words, there are potential costs to inaccurately denying the summary judgment motion, which must be considered as well.

rule amendments, court decisions, and congressional legislation have coalesced to remake the civil litigation system into a completely different system than the one envisioned in the early twentieth century. This Article calls for a new vision of efficiency—a robust accounting of costs and benefits, not just a resort to trying to achieve the cheapest result out of litigation. This new efficiency norm will not necessarily mean a full-throated return to the presumptions of the 1930s. The world and litigation have changed too much for that. But, this Article argues that a reclaimed efficiency definition will necessarily lead to some change—partial shifts back to where we once were and perhaps other shifts taking us in a new direction. Either way, the result will be a better notion of efficiency because the institutions responsible for creating procedural rules and doctrines will be working with a more accurate definition of a critical normative value.



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## Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment


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